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CENTER FOR DEFENSE MANAGEMENT REFORM

Legislating Civil Service Reform:
The Homeland Security Act of 2002

22 June 2006

by

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Executive Summary

The Homeland Security Act (HSA), enacted in November 2002, created the Department of Homeland Security (DHS). The legislation combined twenty-two existing agencies and 170,000 federal employees into a new cabinet-level department—the largest and most complex reorganization of the federal government since the creation of the Department of Defense nearly six decades earlier. Included in this legislation was authority for the Department to initiate new approaches to personnel management outside of the normal rules of the federal civil service. This new personnel management authority was potentially the most significant change in civil service law since the Civil Service Reform Act of 1978 (CSRA). The personnel management provision of the HSA also turned out to be among the most contentious provisions of the proposed law, tying up final passage of the legislation until after the mid-term elections in November 2002 and pitting the administration and major federal employee unions against one another in a hard-fought battle for support on Capitol Hill.

This report is an analytical case history of the passage of HSA, focused on the personnel management section. It includes a review of the recent history of civil service reform, a chronology of the major events leading up to passage of the legislation, and a detailed examination of the rhetorical framing of the debate over the legislation, which we conclude offers a powerful explanation for the passage of the legislation. In examining the case, we also suggest some important implications for implementation of personnel management reform. This analysis is based on a review of public documents and on interviews with key participants.

Civil Service Reform

For much of the early history of the United States, the federal government was small, and government workers were little more than clerks. Positions in government often were given to political supporters of elected officials. As the government grew, so did this system of patronage, until it reached its high point in the "spoils system." The first major reform of this system came on the heels of the assassination of President Garfield by a disgruntled office seeker. The Pendleton Act of 1893 created the first modern civil service system, overseen by a Civil Service Commission. Civil service employment was based on selection according to qualification, and promotion would be based on merit. Selection and promotion were to be free from political influence.

This system survived until 1978 when the Civil Service Reform Act (CSRA) made significant changes. The CSRA abolished the old Civil Service Commission, replacing it with the Office of Personnel Management (OPM), the Merit Systems Protection Board (MSPB) and the Federal Labor Relations Authority (FLRA). The CSRA instituted a system of merit pay based on performance and created a new upper-level Senior Executive Service (SES). Many observers have been disappointed with the outcomes of the CSRA. Two attempts at pay-for-performance failed and were abandoned; OPM has not achieved the anticipated status; the SES failed to produce the hoped-for cadre of highly mobile senior civil servants; and personnel management has become complex, unresponsive, and rules-bound. The common view held that another round of civil service reform was needed. But attempts at government-wide, large-scale reform have been unsuccessful. Instead, successive Presidential administrations have used demonstration projects and other limited and incremental steps to achieve smaller scale reforms. Congress has also enacted important but

smaller-scale targeted reforms. President George W. Bush's administration has had a particular focus on management issues, and homeland security offered an opportunity to advance a proposal for personnel management reform in the new department.

The Homeland Security Act of 2002

After 9/11, the White House established an Office of Homeland Security in the Executive Office of the President. Pennsylvania Governor Tom Ridge was appointed the President's senior advisor for Homeland Security. But, even before 9/11, some in Congress had been pushing for creation of a cabinet-level Department of Homeland Defense—chief among them Senator Joseph Lieberman, chairman of the Senate Government Affairs Committee. The administration initially rejected the idea of a new cabinet department, but faced with increasing pressure from Capitol Hill, the administration set about to draft a proposal for a homeland security department. A small group of five White House staff members, overseen by a senior-level group, was charged with designing the new department. They worked in secret in the President's Emergency Operations Center (PEOC).

On June 6, 2002, the White House announced its proposal for a new Department of Homeland Security. The administration spoke generally about the need for management flexibility in the new department. The Republican leadership on Capitol Hill asked for draft legislation quickly, and the staff group worked with OPM and others to draft the legislation that was sent to Congress on June 18, 2002. The proposed legislation gave the DHS secretary and OPM director authority to institute a new personnel management system "notwithstanding" the provisions of Title 5 U.S. Code (U.S.C.) which governs federal civilian personnel management. Homeland Security Advisor Ridge and OPM Director Kay

Cole James took the lead for the administration in testifying before Congress and in the behind-the-scenes meetings to promote the legislation.

Union opposition to the personnel management provision was strong. The American Federation of Government Employees (AFGE) and the National Treasury Employees Union (NTEU) asserted that the personnel management proposal threatened collective bargaining agreements and eliminated protections for federal workers. Both sides claimed that they were willing to consult and compromise, but the personnel management issues were not resolved; the legislation remained un-enacted heading into the 2002 elections. Both sides took the fight into the November election. The administration charged the unions and their Democratic supporters with holding up legislation that was important to "national security," and the unions charged the Republican Congress and White House with threatening workers' rights. On Election Day, two incumbent Democratic senators were defeated in campaigns where these issues were prominent. When Congress reconvened after the election, the legislation was enacted.

Rhetorical Analysis

The public debate over the personnel management provision, on Capitol Hill and during the 2002 elections, can help to explain the passage of the legislation with its personnel management reforms. Prior to 9/11, the debate over civil service reform was stalemated, as both sides argued over issues such as strategic human capital management, modernization, flexibility, accountability, broadbanding and paybanding, performance-based pay, recruitment and retention, union busting and partisan differences. Our analysis shows that all of these issues were argued over in the post-9/11 period, as well. But after 9/11, the proponents of reform cloaked the management argument in the larger context of national security. Each of the issues of debate prior to 9/11, to varying degrees, took on a national

security element. In addition, a whole new broad national security argument emerged. On the surface, the debate seemed to have changed from management flexibility vs. workers' rights to national security vs. union collective bargaining. Yet, when the debate is examined more deeply, it is clear that even when both sides engaged in a national security debate, the administration made the more powerful national security arguments in the way it framed the discussion, especially in matters of strategy, protection and power. These differences appear to have been highly influential in favor of reform.

Discussion

A number of themes and important issues are raised in this case history. The following is a brief synopsis of each of them.

Secrecy and General Language. The process used by the White House to draft the proposal that was presented to the Cabinet and sent to Congress was an exception to the norm. The proposal was drafted in secret by a small staff group in the White House. It was not coordinated with affected departments or agencies. This process had advantages as well as some offsetting negative consequences. It proved successful in getting a proposal done in a timely manner, but that also meant that the concerns of interested parties were not addressed until the issue was in the public domain where the debates took on a more strident and uncompromising tone.

The initial public White House discussion of a proposal for a Department of Homeland Security addressed only a general need for management flexibility. As some of the members acknowledged in interviews for this study, the staff group lacked expertise in civil service laws and rules, so when it came time for the proposal to be put into legislative language, experts from OPM had to be consulted, but with little time for detailed work.

Therefore, the bill was written in very general language. This also had its advantages and disadvantages. The less detail there was in the bill, the less there was to be debated, argued and amended. On the other hand, a paucity of detail paved the way for critiques by the opposition.

Congressional Processes and Interest Groups. The differences in the ways in which the House and Senate acted on the Homeland Security bill were important. In the House, controlled by the Republicans, action on the President's bill was fast, coordinated, and led by the Republican leadership. The Senate, however, was split evenly along party lines. The political dynamics in the Senate were very different from those of the House, and efforts to expedite a floor vote were frustrated by the inability to invoke cloture. The Senate Republican leadership in the Senate could not expedite the President's bill as did their counterparts in the House. The influence of a single interest group was a significant factor, particularly in the Senate. The ability of the federal employee unions to raise issues and mobilize supporters in the Senate led to contentious debate and delay beyond initial expectations.

Rhetoric and the Election Outcome. The outcome of the 2002 congressional elections decided the outcome of the HSA. Republicans gained the majority in the Senate and expanded their margin in the House. Pivotal campaigns were influenced, if not decided, on issues surrounding the HSA. The legislative fight had been taken into the political arena, and the election outcome decided the legislative outcome.

Intent. There are differing views about the intentions behind the HSA personnel provision. Was the intent to use HSA to bring about broader civil service reform? The OPM staff members who worked on the language and subsequent regulations say they were

focused only on DHS. Yet, others involved in the process saw implications that DHS could

be the starting point for wider reform. For the staff of OPM, the focus was on DHS; for the

White House staff group that drafted the proposal, the focus was DHS with implications for

advancing the administration's management reforms; and perhaps for the most senior White

House officials, the objective was to set the course for widespread reform. Subsequent

enactment of the National Security Personnel System (NSPS) for the Department of Defense

and the administration's proposed Working for America Act are further evidence of the

White House commitment to personnel management reform throughout the federal

government.

Thus we reach these observations:

- The strategies of secrecy and general language were very effective, at least for the short-term goals of drafting and enacting the legislation. However, later developments, beyond the scope of the present study, suggest that the result of secrecy and generality has been that the detailed issues must now be fought out after enactment, in the context of legal challenges and regulation-writing. The price of secrecy and generality in the design and enactment phases may very well be delay and discord during the implementation phase. If questions of politics and policy were not addressed prior to enactment, they must be addressed afterward. It is possible that some of the key problems encountered in the legislative battles, and perhaps now in the implementation phase, could have been tempered by earlier OPM involvement

- The elections were decisive for HSA, and passage of the legislation can be largely explained by the power of the rhetorical framing of the debate.

- There is the suggestion of both opportunism and intention on the question of whether HSA is the beginning of widespread civil service reform. The question of intention may depend on the level of the policy maker, but in any case, the reform is spreading, albeit with implementation problems.

Conclusion

      The story of the Homeland Security Act is a rare alignment of policy environment, policy opportunity, politics, and rhetorical framing. The result was enactment of legislation that many believe would not otherwise have been possible. Why did the confluence of this particular policy environment, policy opportunity, and politics combine to result in enactment of controversial civil service reform? One powerful explanation is the framing of the debate and the rhetorical framing that each side employed. Simple stated, the supporters of reform presented their arguments in terms of national security; their opponents argued in terms of collective bargaining rights. In the post-9/11 policy environment, "national security" was a political trump card. If the first civil service reform was triggered by a national calamity, so was the most recent.

I. Introduction

A. Background

The Homeland Security Act (HSA), passed by Congress and signed by President George W. Bush in November 2002, created the Department of Homeland Security (DHS). The legislation, a response to the new security threat presented by the attacks on New York and Washington on September 11, 2001, combined twenty-two existing agencies and 170,000 federal employees into a new cabinet-level department. This action represented the largest and most complex reorganization of the federal government since the creation of the Department of Defense after World War II. Included in this legislation was new authority for the Department to initiate new approaches to personnel management outside of the normal rules of the federal civil service. This new personnel management authority was the most significant change in civil service law since the Civil Service Reform Act of 1978 (CSRA). The personnel management provision of the HSA also turned out to be the most contentious provision of the proposed law, tying up final passage of the legislation until after the mid-term elections in November 2002, and pitting the administration and major public sector unions against one another in a hard-fought battle for support on Capitol Hill. The civil service reforms in the HSA of 2002 have been labeled "Trojan horse politics,"[1] called "politically clever,"[2] and referred to as an "aggressive campaign to dismantle the federal civil

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[1] Donald P. Moynihan, "Homeland Security and the U.S. Public Management Policy Agenda," *Governance: An International Journal of Policy, Administration, and Institutions* 18, no. 2 (2005): 171-196.
[2] David Firestone and Elisabeth Bumiller, "Stalemate Ends In Bush Victory on Terror Bill," *New York Times*, 13 November 2002, A1.

service."[3] Though ultimately successful in achieving passage of the legislation, the administration is still facing political and legal challenges to its implementation.

This report is an analytical case history of the passage of HSA, focused on the personnel management section. It includes a review of the recent history of civil service reform, a chronology of the major events leading up to passage of the legislation, and an examination of the issues, strategies and arguments. We have analyzed the case for the education it can provide and the questions it raises about civil service policy-making.

B. Methodology

We have approached this project from the perspectives of two scholarly fields that are not commonly joined—Public Policy and Rhetorical Communication. This case involves issues of policymaking and executive-legislative relations familiar to the student of politics and public policy. At the same time, an examination of communications strategies and themes is essential to understanding the legislative outcome. Accordingly, we have employed an interdisciplinary approach that we believe enriches the story and the analysis. Initially, we conducted an extensive search of public documents and materials in order to determine background information, identify the key actors, and examine the processes and communication in drafting and presenting the legislation. Secondly, we conducted interviews with many of the people involved to further develop the story of the case. In examining the debate over the legislation, we analyzed the publicly available materials and extracted the arguments for and against the legislation. The analysis was confined as much as possible to direct quotations, which were categorized into themes according to rhetorical strategies and the potential effects the arguments may have had on key audiences. Finally, we have

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[3] American Federation of Government Employees, *Homeland Security Talking Points.*

attempted to merge the narrative history with rhetorical and policy analyses into a coherent

presentation of what happened and why the legislation was enacted.

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II. A Brief History of US Civil Service Reform

A. Jacksonian Democracy and the "Spoils System"

Today's federal worker must be knowledgeable, skilled, educated, and able to adapt to the ever-changing technologies and social advancements of society. This has not always been the case. For most of the nation's first century, federal workers were likely to have secured their jobs through political placement rather than because of their knowledge and skills. This system of political patronage reached its peak in the administration of President Andrew Jackson. "Jacksonian democracy" justified political patronage by arguing that representation of politically loyal common people in the federal bureaucracy was a logical extension of democracy. But the federal government was becoming a larger and more complex organization. The number of federal employees had swelled from just 20,000 prior to the Civil War to 132,000 in 1883.[4] Incompetence, corruption and high turnover after each election became associated with the patronage system. The resulting costs of the patronage system were becoming apparent by the late nineteenth century.

B. The Pendleton Act and the Birth of the Merit System

Reform would require a dramatic event. The assassination of President Garfield by a disgruntled office-seeker gave life to the reform cause. On May 15, 1882, Senator George H. Pendleton of Ohio, chairman of the Senate Committee on Civil Service Reform and backed by the National Service Reform League, sponsored a bill to introduce merit system principles

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[4] Office of Personnel Management, *Biography of an Ideal: A History of the Federal Civil Service,* accessed 22 July 2005: available from http://www.opm.gov/BiographyofAnIdeal/

into the federal government, replacing the long-established practices of patronage.[5] In November, 1882, Republicans lost the majority in Congress in an election that turned on the issue of reform of the spoils system. The Pendleton Civil Service Reform Act was passed by Congress and signed into law by President Chester Arthur on January 18, 1883. As we shall see in the present case, an election outcome—one hundred twenty years later—would also lead to civil service reform.

The Pendleton Act established the bipartisan Civil Service Commission. It provided that federal workers would be "hired on the basis of merit, promoted within the framework of civil service rules, are not to be explicitly involved in political campaigns and ... once beyond a probationary period, essentially have job tenure."[6] Originally, only about ten percent of federal workers were covered by the Act, but this coverage steadily expanded to virtually all civilian federal employees.

C. Civil Service Reform Act of 1978

The Civil Service Reform Act of 1978 (CSRA) was the first major reform of the civil service law to be enacted since the Pendleton Act. President Carter's Personnel Management Project designed CSRA, which was part of the Carter administration's Reorganization Project to make the federal government more businesslike and efficient. Though the principles of merit were always an explicit part of the Pendleton civil service system, the definition of merit had never been clearly outlined in law. Title I of the CSRA enumerated the following as principles of merit: diversity, talent, fair treatment of employees, equality of

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[5] Ibid.
[6] Ronald L. Johnson, "Patronage to Merit and Control of the Federal Government Labor Force," *Explorations in Economic History* 31 (1994): 91-2.

reward, integrity, efficiency, adequate performance, protection from adverse action for

partisan political reasons, and protection for whistleblowers.[7]

The key provisions of CSRA included:

– Abolition of the Civil Service Commission and creation of the Office of
Personnel Management (OPM) to be the central personnel management
agency, the Federal Labor Relations Board (FLRB) to oversee labor-
management relations, and the Merit System Protection Board (MSPB) to
enforce and adjudicate merit principles in federal employment.

– Creation of the Senior Executive Service (SES) and merit-based initiatives for
senior managers.

– A new performance appraisal system to replace the out-dated performance rating
system.

– Linking pay to performance through a new merit pay system for mid-level
federal managers.

– Authority to conduct demonstration projects in order to experiment with various
personnel systems and policies.

– Defined labor relations administration between union representation and
management of the Federal Civil Service.[8]

CSRA was seen as a system based on merit that would remain flexible with the

changing environment of government while also protecting civil servants from political

influence. President Carter envisioned a system that would be created from within, would be

accepted by the system as a whole, and would be contemporary and flexible enough to

organize and manage the government for the next 100 years.[9]

However, reviews of CSRA implementation were not favorable. At the five-year

point, CSRA had run into pay problems and the changing priorities of a new administration.

At the ten-year point, the general conclusion was that CSRA had fallen short of its lofty

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[7] Donald P. Moynihan, "Protection versus Flexibility: The Civil Service Reform Act, Competing Administrative
Doctrines, and the Roots of Contemporary Public Management Debate," *The Journal of Policy History* 16, no. 1
(2004): 4.
[8] Ibid.
[9] Office of Personnel Management, *Biography of an Ideal*.

objectives. For instance, pay-for-performance had failed twice due to problems in funding and implementation. The SES had failed to become the elite, mobile, senior executive corps that its founders had envisioned as most senior executives did not move between top management positions. OPM did not achieve the hoped-for status on a par with the Office of Management and Budget (OMB) in personnel policy and management. And federal personnel management came to be characterized by complex rules. By the twenty-year anniversary of the CSRA, the focus on civil service seemed to be targeting a future reform agenda for a merit system that would support better efficiency, effectiveness and improved governmental performance.[10]

D. Reform Initiatives of Recent Administrations

A review of personnel management initiatives of recent administrations indicates that successive Presidential administrations have used demonstration projects and other limited and incremental steps to achieve smaller-scale reforms civil service reforms. Congress has also enacted important but smaller-scale, more targeted reforms. Attempts at government-wide, large-scale reform, however, have been unsuccessful.

1. Reagan Administration

Federal personnel management under CSRA began with President Jimmy Carter. The succeeding president, Ronald Reagan, sought to utilize key provisions of CSRA to increase the responsiveness of the civil service to the Executive branch by strategically

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[10] See Douglas A. Brook, "Merit and the Civil Service Reform Act," in *The Future of Merit*, ed. James P. Pfiffner and Douglas A. Brook (Washington: The Woodrow Wilson Center Press, 2000), 4-10.

appointing key personnel in order to carry through his administration's policy agenda.[11] Also, just as his predecessor had done, President Reagan continued to push for reduced bureaucracy and streamlined procedures for improving performance. In 1986, President Reagan proposed the Civil Service Simplification Act "which proposed to exempt some federal agencies from many centralized civil service requirements and standards, while keeping other agencies in the centralized fold." Although the Civil Service Simplification Act did not pass, many of its components became a consistent part of the reform dialogue.[12]

In addition to President Reagan's effort to continue reforming the civil service system through legislation, an alternative approach, piecemeal and less visible, was already underway. Demonstration projects, authorized under Title VI of CRSA enabled OPM to waive federal rules to allow agencies to experiment with personnel management innovations. The experiments were to be evaluated by OPM in order to learn lessons that might be applied to the rest of the government.[13] For example, the demonstration project at the Naval Air Warfare Center Weapons Division at China Lake, California operated a pay-for-performance system for over twenty-five years. The China Lake demonstration project sought to "develop an integrated approach to pay, performance appraisal, and classification; allow greater managerial control over personnel functions; and expand the opportunities available to employees through a more responsive and flexible personnel system."[14] This demonstration project, initiated in 1980, was able to achieve the type of results that had been envisioned by

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[11] Office of Personnel Management, *Biography of an Ideal*.

[12] Patricia W. Ingraham, "A Laggard's Tale: Civil Service and Administrative Reform in the United States," paper prepared for the Conference on Comparative Civil Service Reform (Bloomington, IN: Indiana University, 5-8 April 1997), 2.

[13] Donald P. Moynihan, "Protection versus Flexibility," 6.

[14] US Government Accountability Office, *Human Capital Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, DC: January 2004).

CSRA. Eventually, the China Lake demonstration project became a permanent personnel management system when it was signed into law in 1994.[15]

The National Institute of Standards and Technology (NIST) initiated a demonstration project in 1986 to promote better hiring and retention. This project used alternative personnel management practices in hiring and retaining qualified personnel in highly skilled positions. Over a period of ten years, the project competed effectively with comparable private sector employers in compensation and retention by employing selective bonuses and merit increases, giving managers greater authority over pay and hiring decisions, and creating an employee environment that trusted the rules and regulations directing their duties.[16]

2. The George H. W. Bush Administration

The next administration, under President George H. W. Bush, was faced with the public's eroding perception of the federal service. Bush and OPM Director Constance Berry Newman undertook a series of aggressive initiatives to improve confidence in the public service and to attract and retain quality employees. President Bush successfully achieved legislation to close the pay gap between the private and public sectors, vetoed the 1990 Hatch Act Reform Amendment that would have allowed federal workers to actively participate in political parties, and endorsed legislation on protecting employees who report fraud, waste and abuse through the Whistleblowers Protection Act (WPA).[17]

Other measures were still being suggested and enacted to reform the federal civil service. For instance, in a response to the S&L crisis, Congress enacted the Financial

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[15] Ibid.
[16] Ibid.
[17] Ibid.

Institutions Reform, Recovery, and Enforcement Act (FIRREA). The legislation granted several financial regulatory agencies independence to establish their own compensation systems. The drive to obtain FIRREA-type compensation flexibilities continued over the next decade.[18]

3. The Clinton Administration

Just as President Carter had come into office with a management reform agenda that included plans to fix the civil service system, President Clinton came into office with plans to reinvent government that included plans to improve personnel management. "Reinventing government" was a broad initiative focused on ridding government bureaucracies of red tape and unnecessary idiosyncrasies that foster inefficiencies. It emphasized downsizing the federal workforce, providing broader-based training to its personnel for wider employability, and initiating employment flexibilities in order to empower employees through practices allowable in the private sector but never before offered within the federal government. One such initiative came through three executive orders issued by President Clinton to establish a National Partnership Council and to mandate labor-management "partnerships" in federal agencies. Agencies were to form labor-management committees, involve employees and union representatives as full partners with management to identify problems and craft solutions, provide training in consensual methods of dispute resolution, negotiate over subjects permissible under Title 5, and evaluate progress under these partnerships.[19]

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[18] Doris Hausser, OPM, e-mail to author, June 5, 2006

[19] Bill Clinton, "Labor Management Partnerships," *Presidential Executive Order N. 12871*, 1 October 1993.

The Clinton-Gore National Performance Review (NPR) of 1993 recommended 384 changes to the federal government, including the following in human resource management: (1) Create a flexible and responsive hiring system; (2) Reform the general schedule classification and basic pay system; (3) Authorize agencies to develop programs for improvement of individual and organizational performance; and (4) Authorize agencies to develop incentive award and bonus systems to improve individual and organizational performance.[20]

Attempts at wholly reinventing the entire federal government met with mixed results, but there were other attempts by the Clinton administration to restructure the civil service. The Workforce Restructuring Act was aimed at reducing the number of federal employees. These reductions were often accomplished through reductions in hiring or placing a freeze on hiring and, ironically, are now blamed for contributing to the looming retirement crisis.[21] The proposed Personnel System Reinvention Act (PSRA) was intended to allow individual agencies to take control of the design, implementation and execution of their personnel systems. Although the bill originally went to Capitol Hill with labor support, it did not make it out of committee in either house.[22] The Omnibus Civil Service Reform Act would have established fifteen demonstration projects, with five having no limitations on the numbers of people affected. Congress did not enact this legislation either.[23] However, Congress did act on another, more targeted civil service reform when it removed the Federal Aviation

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[20] United States Government Accountability Office, *Management Reform: Implementation of the National Performance Review's Recommendations*, GAO/OCG-95-1 (Washington, DC: author, December 1994).
[21] United States Government Accountability Office, *High-risk Series*, GAO-01-263 (Washington, DC: author, January 2001).
[22] Patricia W. Ingraham, "A Laggard's Tale," 9.
[23] Ibid.

Administration from all Title 5 provisions. Getting out of Title 5 represented a kind of system disaggregation that also became attractive to other agencies.[24]

The Clinton administration also attempted to make some innovative use of demonstration projects authorized under CSRA. Demonstration projects were authorized to test new methods or concepts in personnel management. The Clinton administration seemed to use some demonstration projects to exempt certain organizations from specific provisions of Title 5, to provide flexibilities that were not otherwise available.[25] Title 5 provides legal coverage for all federal workers, establishes the general pay schedule for government employees, and has, therefore, been the legislative focus for civil service reforms. Most reforms up to this point had been legislated as exemptions from or changes to Title 5.

Demonstration projects were undertaken in some agencies, including the Department of Commerce, Naval Sea Systems Command Warfare Centers (NAVSEA), Naval Research Laboratory (NRL), Army and Air Force research laboratories, and the Acquisition Workforce Personnel Demonstration Project (AcqDemo). The NAVSEA and NRL projects were initiated under the Laboratory Quality Improvement Program (LQIP), a joint-service effort to improve and streamline the business and management processes of the Department of Defense (DoD) laboratory community.[26] The AcqDemo project, authorized by Congress in 1996, provided management flexibility to facilitate a reconfiguration of the acquisition workforce, including a proposed 40-percent reduction in personnel. This project could have covered 95,000 personnel, but it encountered union opposition and only subsequently

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[24] Doris Hausser, OPM, e-mail to author, June 5, 2006
[25] James R. Thompson, "The Civil Service Under Clinton," *Review of Public Personnel Administration* 21, no. 2 (Summer 2001): 87-113.
[26] Ibid., 92.

covered about 5,000 personnel.[27] Congress also acted to provide certain personnel

flexibilities for the Internal Revenue Service (IRS). This was the first time agency-specific

chapters had been added to Title 5, setting the stage for future agency-specific chapters for

NASA, the SEC, DOD and DHS.

4. The George W. Bush Administration

The George W. Bush administration came to office with both a policy agenda and a

management focus. The Bush administration addressed its agenda for personnel

management reform as part of the President's Management Agenda (PMA), begun in 2001,

as a comprehensive program to identify management reforms and improve government

performance in five key areas. One of these priority areas is the "Strategic Management of

Human Capital."

Also, in his first month in office, President Bush revoked the Clinton executive orders

regarding labor-management partnerships and the requirement that agencies negotiate on

discretionary subjects as authorized in Title 5.[28] This action would later contribute to union

opposition to HSA. According to NTEU president Colleen Kelly, this "sent a very clear

message [...] that this is what the administration thought of unions. So, from there, every

opportunity they had to try to take away rights from employees and/or unions, they did."[29]

Early personnel management reform initiatives growing out of the President's

Management Agenda were the Freedom to Manage Act and the Managerial Flexibility Act.

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[27] Ibid., 93.

[28] George Bush, "Revocation of Executive Order and Presidential Memorandum Concerning Labor-Management Partnerships," *Presidential Executive Order 13203*, 17 February 2001.

[29] Colleen Kelly, interview by authors, 22 September 2005.

The Freedom to Manage Act would allow agencies to identify and propose elimination of existing statutes that limited effective management and force Congress accept or reject the changes on a fast-track basis.[30] This proposition was met with immediate controversy and quickly disappeared. The Managerial Flexibility Act sought to make specific amendments to Title 5, including additional management flexibilities in hiring critical personnel, greater authority for continued retirement incentives, ease of establishing demonstration projects, creation of individual agency personnel systems, and greater pay flexibilities to increase performance-based rewards.[31] This legislation also failed to win sufficient support to become law. However, many of its provisions were later enacted, except those that would have expanded authority for demonstration projects or given OPM authority to establish permanent alternative personnel systems.[32] The Bush administration was having no more success than its predecessors in pushing broad personnel management reform through Congress. According to Richard Falkenrath, Special Assistant to the President and Senior Director for Policy and Plans in the Office of Homeland Security:

> The President had a management agenda pre-9/11, and it wasn't getting any traction. The President's Management Agenda [...] basically wanted to improve the quality of management in the federal Executive Branch. The hallmarks of [PMA] were: less Congressional micro-management, greater or broader statutory mandates, larger appropriations accounts, and executive discretion to hire and fire and control the departments. The philosophical essence of the President's Management Agenda was basically to treat department and agency heads like CEOs, and let them control their agencies.[33]

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[30] Donald P. Moynihan, "Homeland Security," 175.

[31] Donald P. Moynihan, "Homeland Security," 176.

[32] Doris Hausser, OPM, e-mail to author, June 5, 2006.

[33] Richard Falkenrath, interview by authors, 22 September 2005.

Thus, the Bush administration had the policy framework for addressing personnel management reform in place prior to September 11.

Before September 11, then, a succession of Presidents had proposed reforms in the management of federal personnel. Not all of the reforms proposed by the four administrations from Reagan to George W. Bush were identical, even though sometimes the language sounded similar. For instance, some focused on management "flexibility," some on employee "flexibility." It seemed that there was more consensus that a problem existed with personnel management in the federal government than agreement about the nature of the problem or the remedies to address it. But dissatisfaction with the status quo was widespread, with the personnel system generally regarded as a rules-bound barrier to effective and efficient government performance. Meanwhile, demonstration projects were experimenting successfully with new ways to recruit, retain, train, pay and provide incentives for federal employees and Congress was enacting a few targeted, incremental reforms. Though the large-scale reforms requiring legislation had failed to be enacted, the stage was set for reform should an opportunity arise.

III. Case History of Design and Enactment of Personnel Management Reform in the Homeland Security Act of 2002

On November 25, 2002, President George W. Bush signed H.R. 5005, the Homeland Security Act of 2002, into law. The Act directed the largest reorganization of the federal government since the creation of the Department of Defense in 1947. This chapter provides a case history of the enactment of this historic legislation, focusing on the personnel management provision of the bill. The case describes the political and policy environment preceding introduction of the administration's proposal, identifies the processes, organizations and people involved in designing the proposed legislation, describes the debate over the legislation including those who lobbied for and against it, and concludes with its enactment after the dramatic elections of November, 2002.

A. Preceding Events

Chapter II outlined the personnel management policy environment that preceded September 11, 2001, as a succession of Presidential administrations sought to improve the management of personnel in the federal government. Also preceding 9/11, and increasingly thereafter, were efforts to improve the nation's preparedness for attacks on the homeland, specifically to create better federal organizational capability to deal with homeland security.

1. Hart-Rudman Commission

The Hart-Rudman Commission, led by former US Senators Gary Hart and Warren B. Rudman, was commissioned to conduct the most comprehensive review of American

security since the National Security Act of 1947.[34] The commission worked between July 1998 and February 2001, issuing reports in three phases. The commission recommended creation of a new National Homeland Security Agency (NHSA) with responsibility for planning, coordinating, and integrating the various US government activities involved in homeland security.[35] The commission recommended that the Federal Emergency Management Agency (FEMA), the Border Patrol, the Coast Guard, and the Customs Service be placed in this new agency.

The commission discussed the faults within the federal civil service and recommended changes to ensure this system helped provide for the nation's security. The aging of the civil service workforce, the difficulty in hiring quickly, the need to retain Information Technology (IT) personnel, and the requirement for multi-lingual civil servants were among the issues they identified.[36]

The commission also suggested that the President develop a comprehensive strategy to heighten ability to prevent and protect against all forms of attack on the homeland, and to respond to such attacks if prevention and protection failed.[37] But, the commission was operating under the belief that an attack could occur within the next quarter century; it did not foresee the attack that occurred on September 11, 2001.

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[34] United States Commission on National Security/21st Century, *Roadmap for National Security: Imperative for Change*. (Washington DC: author). Available from http://www.au.af.mil/au/awc/awcgate/nssg/

[35] United States Commission on National Security/21st Century, *Roadmap for National Security: Addendum on Implementation,* (Washington DC: author, 15 April 2001). Available from http://www.au.af.mil/au/awc/awcgate/nssg/addendum/Implementation_Plans.pdf

[36] United States Commission on National Security/21st Century, *Imperative for Change*.

[37] United States Commission on National Security/21st Century, *Addendum on Implementation*.

Others in the administration were also thinking about the need for a new organization for protecting the homeland. Joel Kaplan recalled:

> Prior even to September 11th, in May of 2001, the Vice-President had been tasked with reviewing the organizational structure for weapons of mass destruction [and] counter-terrorism. He had hired Admiral Abbot to be the head of that office. I believe Admiral Abbot was supposed to start around September 5th or 10th. So, within the administration, there already [was] some thinking that we needed to look at how the government is organized for these sort of complex issues.[38]

2. September 11, 2001 and after

A major terrorist attack on the United States homeland was not predicted to happen so soon after the Hart-Rudman Commission issued its report, of course. But the attacks of 9/11 provided the impetus for change, and they demonstrated the relevance of some of the Commission's findings. Professor Donald Moynihan describes the attacks as creating disequilibrium in the political system, which gave the President the opportunity to create change or reorganization.[39] John Gartland, then Director of Legislative Affairs at the Office of Personnel Management, stated that without the attacks of 9/11, personnel management reforms such as those in the HSA of 2002 would "not have seen the light of day."[40] Richard Ryan refers to the birth of DHS as a rare opportunity for President Bush to seize the momentum and implement personnel reform, perhaps even extending it throughout the entire federal government.[41]

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[38] Joel Kaplan, interview by authors, 26 September, 2005.

[39] Donald P. Moynihan, "Homeland Security," 192.

[40] John Gartland, interview by authors, 28 August 2005.

[41] Richard W. Ryan, "The Department of Homeland Security Challenges the Federal Civil Service System: Personnel Lessons from a Department's Emergence," *Public Administration & Management* (3 August 2003): 103.

3. Initial Attempts at Reorganization

On October 8, 2001, the President issued an executive order that established an Office of Homeland Security (OHS) within the Executive Office of the President.[42] Later that day, Governor Tom Ridge was named Director of OHS, and assumed the position of "Assistant to the President," a title like those of other senior White House counselors and policy advisors. Like other White House staff appointees employed at the President's discretion, Ridge did not occupy a statutory position, and his appointment did not require Senate confirmation.[43]

While Ridge's status gave him a privileged advisory role to President Bush, it shielded him from Congress and limited the OHS budget to discretionary funds from the White House office budget.[44] Director Ridge did not have either formal authority or budget control over many of the organizations he was to coordinate. Moreover, he was out of the reach of the Congress and, hence, not obligated to testify about matters related to OHS. Joel Kaplan explained these circumstances surrounding Ridge's position caused some tension:

> There was an issue with getting somebody to testify in front of the Congress. Congress wanted one person who could come up and testify about the government's Homeland Security efforts. There's a long-standing Executive Branch position that White House Assistants to the President, as opposed to [Senate-confirmed] cabinet secretaries, did not testify except only in rare instances […] Governor Ridge, as Head of Homeland Security, was an Assistant to the President. So, there was constant tension that [Congress] wanted somebody to come up and be accountable for all of the administration's efforts. That was a source of some friction.[45]

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[42] George W. Bush, "Executive Order Establishing Office of Homeland Security," *Presidential Executive Order 13228,* 8 October 2001.

[43] Richard S. Conley, "The War on Terrorism and Homeland Security: Presidential and Congressional Challenges," paper prepared for the Conference, *Assessing the Presidency of George W. Bush at Midpoint: Political, Ethical, and Historical Considerations,* (Gulfport, MS: University of Southern Mississippi, 22-23 November 2002), 6.

[44] Ibid., 6.

[45] Joel Kaplan, interview with authors, 26 September 2005.

On Capitol Hill, more elaborate organization designs dealing with homeland security began to appear. On May 5, 2002, Senator Joseph Lieberman (D-CT), a prospective Democrat presidential candidate, introduced a bill (S. 2452) to establish a Department of National Homeland Security and the National Office for Combating Terrorism. The head of the new department, who would be both a member of the Cabinet and the National Security Council, "would have the rank and power," said Senator Lieberman, "to ensure that the security of our homeland remains high on our national agenda, and that all necessary resources are made available toward that end."[46] The bill was referred to the Government Affairs Committee, which Lieberman chaired and where he would start to move the bill quickly through committee consideration. The administration initially opposed the creation of a new cabinet department, but pressure for a new agency was building in Congress. At the same time, Director Ridge was facing administrative problems running his office. As reorganization proposals gained momentum on Capitol Hill, the idea of creating a new Department began to develop in the White House.

A memo written by Richard Falkenrath, policy advisor to Ridge,[47] proposed a new organization merging the Coast Guard, Customs Service, and Immigration and Naturalization Service (INS) into a border protection agency. According to Bruce Lawlor, White House Homeland Security Staff Senior Director for Protection and Prevention, this reorganization was needed because:

> at the time, when you approached the border, you had to go through about
> four different agencies to be processed through. It made no sense. We

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[46] Harold C. Relyea, *Homeland Security: Department Organization and Management*, RL31493, (Washington DC: Congressional Research Service, The Library of Congress, 2002), 31.

[47] Steven Brill, *After: How America Confronted the September 12 Era* (New York: Simon & Schuster), 285.

literally had situations down in the southwest border where you had two highway lanes; one lane would be manned by Customs; one lane would be manned by the INS, with completely separate rules as to how people were processed into the country.[48]

This reorganization encountered resistance from many in the Cabinet to whose Departments these agencies belonged. Joel Kaplan explained, "What you had was sort of natural jurisdictional, territorial pulls where everybody said, 'you can't remove this from my agency; it would be devastating.' It just ground to a halt...."[49] Bruce Lawlor said:

> We went out to all the departments. We engaged them; we talked to them; we showed them drafts. It was interactive. We tried to be collegial. We tried to […] come to some sort of consensus. There was resistance, and near the end [...] there was a meeting of the principals, cabinet secretaries, before the President to consider this. It was presented; the cabinet secretaries almost went into revolt. And that was the end of it.[50]

4. White House Designs New DHS

Regardless of resistance to the proposed border protection agency, President Bush instructed his chief of staff, Andrew Card, to come up with proposals for a homeland security department. Card organized a White House staff group to develop a homeland security agency proposal in secret, without explicit consultation with or advance notice to congressional leaders, cabinet secretaries, or agency heads.[51]

The staff group that met secretly in the Presidential Emergency Operations Center (PEOC) was a working group of five White House staff, which would become known as the

[48] Bruce Lawlor, interview by authors, 23 September 2005.

[49] Joel Kaplan, interview, 26 September 2005.

[50] Bruce Lawlor, interview.

[51] Donald Moynihan, "Homeland Security," 178.

"G-5."[52] They were Richard Falkenrath; Mark Everson, then comptroller of the Office of

Federal Financial Management and later Deputy Director for Management of OMB; Joel

Kaplan; Bruce Lawlor; and Brad Berenson, Associate Counsel to the President. The G-5

group answered to an oversight group of administration principals: Chief of Staff Card; Josh

Bolten, then Deputy Chief of Staff for Policy; Mitch Daniels, Director of OMB; White House

counsel Alberto Gonzales; and Nick Calio, head of White House Legislative Liaison.[53] This

group was tasked with developing the concept for reorganizing the federal government to

deal with homeland security.

> Members of the group worked in secret. Joel Kaplan explains,

> It was secret in the beginning because we wanted freedom of deliberation and
> real thought. It was a terrific process. Later, it was secret because there was a
> sense that we were sort of brought along kicking and screaming, and this was
> sort of going to happen anyway. But the truth is this was exceptionally hard to
> get done. Especially because of the Congressional jurisdictional problems and
> the fact that this has to be done as one fell swoop or else it'll never get done.
> It'll get nickel-and-dimed to death.[54]

> This potential opposition included Cabinet members, intent upon keeping their

departments intact, Members of Congress who would attempt to protect their committee

interests, and union leaders interested in maintaining their right to collective bargaining.

5. Presidential Announcement of June 6, 2002

On June 6, 2002, the President announced his proposal to create the Department of

Homeland Security. The announcement was a planned, coordinated event orchestrated to

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[52] Joel Kaplan, interview.

[53] Ibid.

[54] Ibid.

announce the President's plan to all the key Washington players within a short time frame. Lawlor states:

> We had a timed rollout strategy; it was quite remarkable. For a period of about three days, it was timed down to the half-hour, who was doing what, when it was going to happen, who was going to go on what show. I think the President or Andy Card notified the Speaker and the Majority Leader in the evening. In the morning there was a Cabinet meeting at nine o'clock. All the Cabinet members were there. The President walked in and said "This is what I'm going to do. Any questions?" It was the most wonderful thing I've ever seen: "This is what I'm going to do. I'm the President of the United States." […] It was a tremendous exercise of leadership. George Bush has got guts, and once they understood it, with maybe one exception, they all saluted and did what was right.[55]

Management flexibility was addressed only in general terms at the time of the announcement. Briefing the press as a "senior administration official," Homeland Security Advisor Ridge said "it is our hope … that as we send specific legislation to the Hill that this new cabinet secretary … will be given the freedom to manage; i.e. we'd like to see some flexibility …so that they can move people and resources around in times of crisis or emergency. I think that's critical."[56] While the announcement itself was relatively straightforward, the proposal and the issues it addressed were rife with complexity.

B. The President's Proposal for a Department of Homeland Security

The designers of the DHS had many issues to address—including reorganizing numerous agencies and dealing the with the management challenges of integration. They also had an opportunity to create new approaches to organization and management rather

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[55] Bruce Lawlor, interview.

[56] The White House, Office of the Press Secretary, Department of Homeland Security Press Briefing, "Press Briefing By a Senior Administration Official on President's Announcement on Homeland Security," June 6, 2002, available at http://www.fas.org/irp/news/2002/06/wh060602.html, visited June 22, 2006.

than simply replicate old bureaucracies. There were also practical issues to be dealt with like

drafting legislation on a tight schedule and dealing with potential opposition.

1. A New and Complex Organization

The figures below illustrate the challenge of this reorganization. Figure 1 shows the

many organizations, departments, and agencies involved in homeland security functions.
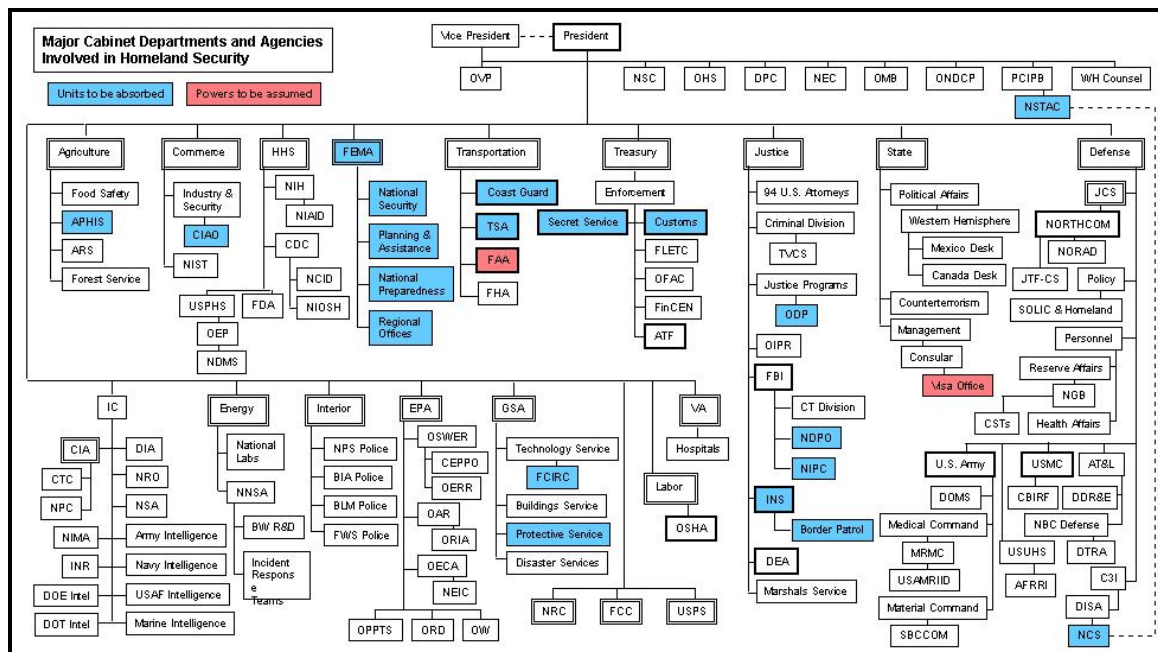
Figure 1. Major Cabinet Departments and Agencies Involved in Homeland Security[57]

Figure 1 illustrates the challenge for the White House Office of Homeland Security,

trying to coordinate policy and tie organizations together with a unifying concept when they

did not work within the same overall organization. Figure 2 depicts a reorganized

department, streamlining the various functions under four main components: Information

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[57] Department of Homeland Security. "Major Cabinet Departments and Agencies Involved in Homeland Security," Available from www.dhs.gov.

Analysis and Infrastructure Protection, Emergency Preparedness and Response, Border and

Transportation Security, and Science and Technology.
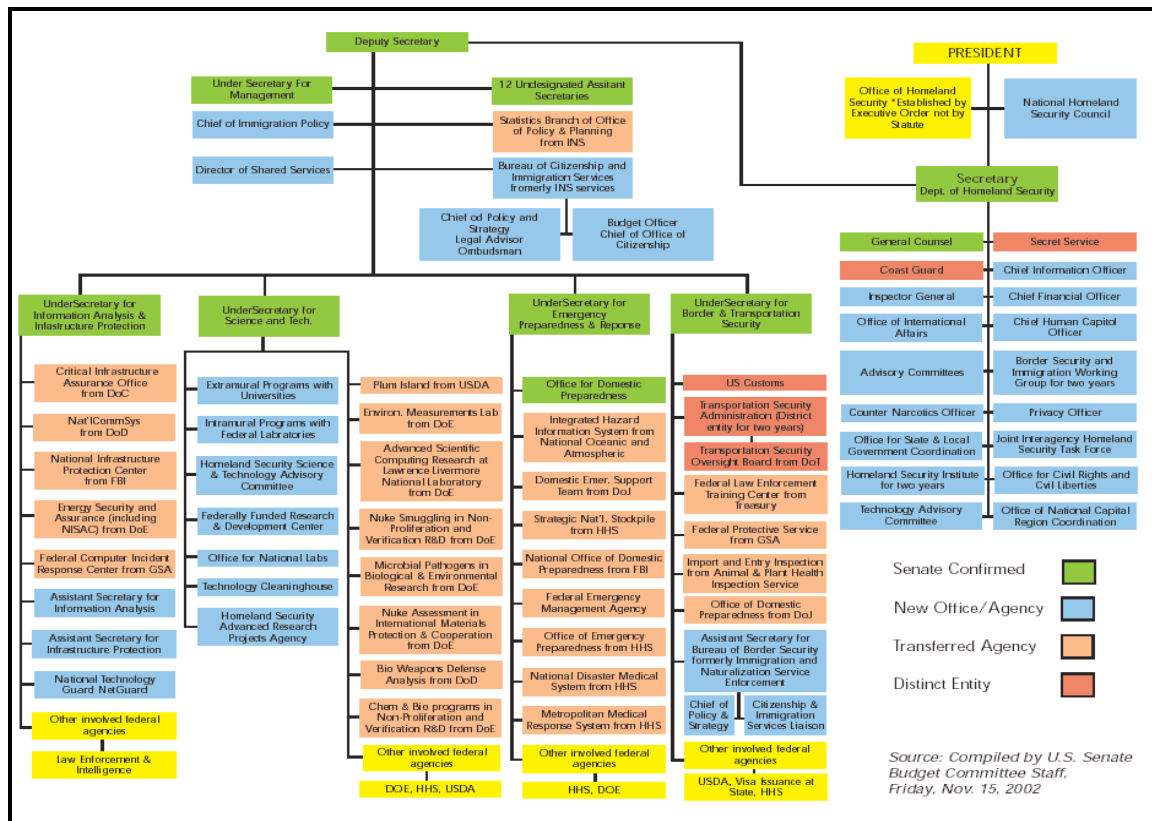
Figure 2. Department of Homeland Security Organization Chart[58]

Bruce Lawlor discussed the organizational challenge:

When we originally built the Department, if you think about it, you've got
information, critical infrastructure protection—that's two of your functions. That's
one Directorate. We've got the borders, law enforcement and transportation security.
There's another Directorate. And emergency response and recovery—that's the third
Directorate. We only had three Directorates when we started. Then the Vice President
came along and said, "You've got to do something more about bio-terrorism." That's
the fourth Directorate, Science and Technology.[59]

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[58] Department of Homeland Security. "Department of Homeland Security Organization Chart," available from
www.dhs.gov.

[59] Bruce Lawlor, interview.

The merger of twenty-two agencies posed large integration challenges in personnel management. The entities to be merged into DHS consisted of seventeen different unions, seventy-seven existing collective bargaining agreements, nineteen financial management systems, twenty-two human resources servicing offices, and eight payroll systems. Mason Alinger, Deputy Legislative Director of the House Committee on Government Reform, stated:

> You're melding together twenty-two different departments and agencies; you've got [170,000] employees;[60] you've got seventy-two collective bargaining agreements; you've got all these different things. You can't put that stuff together, shove it in one box and pretend like it's going to work.
>
> That was our soundest argument: that we need to just let them wipe the slate clean and start with a new system or else this thing is doomed from the start.[61]
>
> Alinger suggests, therefore, that the mere act of merging disparate entities into a new

department necessitated looking at a new system of personnel management. OPM's Doris Hausser explains: "Personnel management experts familiar with the entities that were to be combined were keenly aware ... that an extraordinary number of detailed agency specific legislative provisions affecting personnel management were embedded in their authorizing legislation."[62]

2. Management Issues

Others, however, were more inclined to argue that it was the urgent nature of the mission of DHS that called for new approaches to management. The White House proposal addressed three important areas of "management flexibility": budget authority (the ability to

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[60] In the interview, Mr. Alinger stated 500,000 rather than the actual 170,000 that were affected by HSA. We believe he may have confused the numbers for the Department of Defense NSPS reforms on which he also worked.

[61] Mason Alinger, interview by authors, 23 September 2005.

[62] Doris Hausser, OPM, e-mail to author, June 5, 2006.

reprogram funds), reorganization authority, and personnel management authority. About

personnel management, Rep. Rob Portman (R-OH), a member of the House Select

Committee on Homeland Security, said, "It's absolutely critical, if this department is going to

work, that the President be able to take the twenty-two different personnel systems [...] and

meld them, together in a way that we [...] make an effective agency to combat terrorism. The

agility of the terrorist needs to be matched by a more agile federal workforce."[63]

In addressing management issues, the members of the G-5 were advised by OMB

Director Daniels to include ideas from the President's Management Agenda. The need for

reform in personnel management was so evident to the G-5 that they spent very little time in

deciding that personnel management reform would be part of the DHS legislation.[64] Bruce

Lawlor stated:

> It wasn't a big debate. This represents an opportunity to change the way federal civil
> service is wrought. And we need to do that; it's in desperate need of reform. There
> was nobody there that didn't think it was in desperate need of reform. So, to that
> extent, the decision to do it was very easy and not contentious. I don't want to say the
> decision was made lightly, but I don't think it was ever a debate.[65]

On Capitol Hill, Congress seemed most troubled by budget and reorganization

authorities and their effects on congressional authorization and appropriations processes and

committees.[66] Concern over the personnel management flexibilities would come later.

3. Drafting Legislation

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[63] Rep. Rob Portman, "Homeland Security Legislation." Interview by Margaret Warner on PBS *OnLine NewsHour*, July 26, 2002. Available online from http://www.pbs.org/newshour/bb/congress/july-dec02/hsl_7-26.html

[64] Richard Falkenrath, interview.

[65] Bruce Lawlor, interview.

[66] Brad Berenson, interview by authors, 31 October 2005.

The President's original proposal was presented as a concept. It was not presented in legislative language. The G-5 thought there would be ample time to take an organized approach to writing the legislation. But, as Falkenrath explains, there was only a short period of time between the announcement and the need to submit legislative language.

> Speaker Hastert looked at the calendar and said, "Alright, Mr. Vice President. We'll do this. But you've got to give me the language […] in five days." We weren't prepared to do that. We'd done really good fact sheets and press releases and all that, little booklets and stuff, but legislative language to transmit to the Hill—we still had to prepare it. So, we're like: "Oh my God. What are we going to do?" We got a legislative drafting expert out of DOJ, had him assigned to the White House, and really quickly put together a 38-page bill. That was what we transmitted to the Hill.[67]

Berenson also discussed the short period of time to produce the legislative language.

> Originally, we had about four weeks to write the bill. However, the Vice President and Speaker of the House Dennis Hastert made a deal to get the bill to Capitol Hill quickly in order to get it passed by the August recess.[68]

Coordination of the legislative drafting was assigned to Brad Berenson. When it came time to write the legislative language on personnel management, the G-5 turned to the Office of Personnel Management for drafting assistance. OPM formed its own small working group. According to OPM's Ed Flynn, that language was constructed essentially by a group of five people at OPM: Jeff Sumberg, Deputy Assistant Director for Workforce Relations; Ed Hickey, Senior Advisor to the Chief of Staff Paul Conway and Senior Advisor for Homeland Security; John Landers, of the OPM Retirement Policy Division; Harry Wolf, from Congressional Relations; and Flynn.[69] Significantly, the draft included the Director of OPM, along with the Secretary of Homeland Security, as jointly responsible for any new

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[67] Richard Falkenrath, interview with author.

[68] Brad Berenson, interview with author.

[69] Ed Flynn, interview by authors, 28 August 2005.

regulations. This served to institutionalize a role for OPM in the design and operation of any

new personnel management system for DHS.

According to Berenson,

> [I] put together a legislative drafting team. This group sub-delegated some of the drafting work to OMB for contracting issues and OPM for the personnel provisions. I was put in charge of the process for writing the legislation. This would be the first time the President had sent actual bill language to Congress because all previous proposals had been outlines or concepts […] We worked around the clock. So, we didn't have a lot of time to tinker with what we received from OMB and OPM. We might have kicked the tires a little, but we basically just dropped their work into the bill.[70]

The entire bill comprised only thirty-eight pages. The language developed by the

staff group was an attempt to use simpler wording and delegated authority. Richard

Falkenrath explained,

> We did it the old-fashioned way which says, "There shall be created a Department. All powers are vested in the Secretary. The Secretary shall have all total control over the Department. The Department shall consist of the following assets and authorities which shall be transferred to him. He shall then have the authority to reorganize, reprogram, etc. He shall have the authority to promulgate new personnel regulations, notwithstanding Title 5." It was an ideal way of legislating, which is just very short, simple, granted authority, the way they used to do it in Congresses 1 through 50.[71]

Section (a) of the personnel management provision of the proposed bill contains just

sixty-eight words:

> Notwithstanding any other provision of this title [Title 5], the Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish, and from time to time adjust, a human resources management system for some or all of the organizational units of the Department of Homeland Security, which shall be flexible,

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[70] Ibid.

[71] Richard Falkenrath, interview.

contemporary, and grounded in the public employment principles of merit and fitness[72]

Section (b) required simply that any new system be "flexible and "contemporary," preserve the principles of merit and fitness, not waive equal employment or other employee rights and remedies, ensure the right to organize and bargain collectively, and made certain pay provisions non-waivable. This section also contained a five year sunset provision on authority to issue new regulations.[73]

This provision of the HSA introduced the most dramatic potential shift in the direction of federal personnel management flexibility since CSRA, perhaps even since the Pendleton Act. Writing in general language to empower the Secretary and OPM Director to establish new personnel management practices, avoided time-consuming debate over the details of any such plan. Director James explained, "Our initial take at this was: let's make the legislation as broad as possible so that we could have the freedom to fill in the details as we went along."[74]

The administration's bill, HR 5005 was introduced in the House on June 24, 2002 with expectations that it would pass quickly. After all, the idea of a homeland security agency had originated in the Senate and, politically, it seemed that few officeholders would want to stand in the way of a homeland security bill, especially in an election year. However, strong opposition was encountered in the Senate, largely due to strong union opposition to the personnel provisions.

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[72] U. S. Congress, House, 107th Congress, Second Session, H.R. 5005, Section 761, introduced June 25, 2002.

[73] Ibid.

[74] Kay Coles James, interview by authors, 23 September 2005.

3. Opposition Emerges

The first signs that the bill's personnel management language might cause political problems emerged quickly. Those key words, "notwithstanding any other provision..." immediately triggered a problem. As Falkenrath describes:

> We had no idea what we were "notwithstanding." Title 5 is a big Title. It turns out Title 5 contains whistleblower protections. So, within two days the unions are putting out a press release that says the President wants to end whistleblower protections. Well, that's nonsense. We don't want to end whistleblower protections. We wanted to give the Secretary the authority to write new regulations for the personnel system, notwithstanding what had come before.[75]

When asked if the G-5 group had anticipated opposition, Bruce Lawlor stated, "Yeah, we knew that…we expected that. But, hey we were building the biggest organization since World War II. Who cared?"[76]

It turned out that the major public-sector unions cared a lot. Still smarting from the revocation of the Clinton-era labor partnerships, union leaders saw the HSA personnel provisions as just one more piece of evidence that the Bush administration was out to break the unions. In labor's view, the administration wanted to "eliminate collective bargaining rights [...] and exercise unchecked power over federal workers."[77] Moreover, the union leadership was bothered by the lack of consultation. In the words of AFGE president Bobby Harnage, the administration's approach showed "arrogance and the impatience":

> I think they got to looking at it and saying, "You know, these guys don't want to change. We're wasting our time talking with them. We've got the support of Congress. With the American public behind us, all we've got to do is scream, 'Homeland Security.' Let's just do it." They didn't want to be confused with facts, and they didn't want too many people adding to it because that made it a

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[75] Richard Falkenrath, interview.

[76] Bruce Lawlor, interview.

[77] AFL-CIO, "The Department of Homeland Security," *Executive Council Resolution*, 6 August 2002.

little more confusing. So, you had this group that was put together, sat down and drafted it exactly the way it was wanted. […] That's a very poor way to do business.[78]

The fight over the DHS bill became, in large part, a fight over personnel management rules. John Gartland agrees, "it was the personnel reforms. That's what the unions had a real problem with. You had the biggest change in the civil service since the civil service was born in 1978. You gave authority to the new Secretary, and OPM. That never had been done before."[79] The struggle over the personnel reform portion of the HSA led to delayed action in the Senate past the one-year anniversary of 9/11 and up to the mid-term elections of 2002.

C. Homeland Security and the Fight over Personnel Management

The focus of action on homeland security shifted to Capitol Hill, where the administration, Democrats and Republicans in the House and Senate, and union leaders each adopted processes and strategies to deal with the issues. The longest-lasting and most divisive issues were the questions of personnel management.

1. Congress takes up the Legislation

Homeland Security Advisor Tom Ridge and OPM Director Kay Cole James were the prime advocates for the administration on Capitol Hill, testifying before committees and persuading Senators and House members. Director James recalls,

> I remember the first time I was called over to the White House for one of those meetings with legislators. The President talked about the legislation and how important it was, and the first thing out of the box was the personnel issue. So

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[78] Bobby Harnage, interview by authors, 3 April 2006.

[79] John Gartland, interview.

the President said, "Kay why don't you … [brief us on the issues?] I was at every meeting at the White House, and I always had to make the case."[80]

Congressional action began in the House and Senate almost simultaneously, but on different legislative proposals. In the Senate, on June 24th, the Government Affairs Committee favorably voted the Lieberman Bill (S. 2452) out of committee. This was the same day that the administration's bill, HR 5005 was introduced in the House. In the House, Speaker Hastert appointed a nine-member Select Committee, chaired by Majority Leader Dick Armey, to coordinate the House legislative process on this legislation. Optimism still prevailed. On July 16th, Senator Lieberman offered his prediction of the schedule for this legislation.

> The House will take the proposal up [...] next week. Our committee [will] mark up our bill in the Senate next Wednesday, take it to the floor the following week, and if all goes well, these bills will pass both houses before [...] the August recess and our conference committee will work together and I think as early as September we'll bring out a common bill to the floor of each house.[81]

The Senate Committee moved first, on the Lieberman Bill, but the House was quicker to move on the administration's bill. As Falkenrath explains:

> The House was in Republican control. They set up this unbelievable forced march in July where they took our bill and simultaneously referred it to 13 committees, full committees of jurisdiction and all done simultaneously. I mean in one week they all had hearings and everything. And then they all marked up, and they all transmitted their mark-ups to the Select Committee on Homeland Security whose nine members then dealt with their mark-ups, and basically, that's where the deal in the House got done.[82]

Committee hearings and mark-up sessions went on in all of the committees immediately; all the committees discharged their bills on July 12th. Once the House committees reported their

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[80] Kay Cole James, interview.
[81] Senator Joseph Lieberman, interview. PBS *Online NewsHour*, 16 July 2002.
[82] Richard Falkenrath, interview.

mark-ups, the Select Committee acted quickly to bring a bill to the floor. The bill provided

the Secretary of DHS with greater management flexibility in the areas of performance

appraisal, job classification, pay rates and systems, labor management systems, and adverse

actions and appeals. The bill also provided civil rights and disabled protections, preserved

veteran's preferences in hiring, and assured that the Fair Labor Standards Act, Social

Security Act and the Family and Medical leave Act would continue to apply to federal

employment. The bill also preserved the workers' right to organize, but continued the

president's authority to limit collective bargaining for national security reasons and extended

this authority to the secretary.[83]

The House took up the bill on July 26. Six amendments were defeated on close

party-line votes. The House passed the bill on a vote of 295 to 132.

The bill now moved to the Senate, where two cloture motions were made to try to

bring a bill the floor. Both were withdrawn, and Senate Majority Leader Tom Daschle

announced that a vote on the bill would be put off until after the August Congressional

recess. The real fight over the bill would take place in the Senate. Falkenrath explains,

> In the Senate, there was a totally different dynamic where Lieberman was in
> charge of this issue. There was no simultaneous referral; there was a single
> referral to Government Affairs Committee. He thought he could write this bill.
> He had a bunch of hearings and a bunch of thoughts. He had his staffers
> working on it, and he was talking to members. And he really thought he was
> going to write this bill. What he was coming up with was just unacceptable to us
> on many fronts—especially on this one [personnel provisions]. I mean, on this
> one he was totally captive to the unions and gave us nothing. I mean, actually

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[83] U.S. Congress, House, Select Committee on Homeland Security, "Transforming Government for the 21st Century: Summary of H.R. 5005, July 23, 2002; pp. 2-3.

restricting the Executive in some ways. It was just totally unacceptable. It was not the only unacceptable thing, but it was totally unacceptable.[84]

When the Senate returned to Washington after the summer recess, the bill was brought to the floor for consideration on twelve days between September 4 and September 25 before returning it to committee.

As the debate raged on and off the Senate floor, it became more political and more partisan. The administration began portraying the Democrats in Congress as special interest supporters and against the nation's security. A search of the *Weekly Compilation of Presidential Documents* from August through the November 5 election revealed over three dozen public statements by President Bush in which he criticized the Senate or blamed "special interests" connected to Democrats for the delay in the homeland security bill.[85] Senate Republican Leader Trent Lott was quoted as saying, "The homeland security department is being blocked by Senate Democrats who are determined to protect the interests of their union bosses in the bureaucracy."[86] Maureen Gilman, NTEU Director of Legislation, argues that it was the Republicans that had been preventing votes from taking place:

> [T]hroughout the whole thing, the administration and their Republican allies on the Hill were much more successful than we and the Democrats on the Hill were in […] the public relations aspects of who was holding this up. I think there were six cloture votes that the Democrats wanted. Republicans voted that down but were still able to maintain the idea that the Democrats are preventing the establishment of the Department of Homeland Security. And it actually went through the election that way.[87]

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[84] Richard Falkenrath, interview.

[85] Richard S. Conley, "The War on Terrorism and Homeland Security," 5.

[86] Adriel Bettelheim, "Senate's Failure to Resolve Personnel Management Issue Stalls Homeland Security Bill," *CQ Weekly*, 19 October 2002.

[87] Maureen Gilman, interview by authors, 22 September 2005.

Ridge and James assert that they were open to working with the unions. Ridge explains, "We spent a lot of time assuring them [legislators] that we would engage with the unions, and we did seriously consider many of their objections and recommendations."[88] They claim also to have been willing to make deals and concessions to get the bill passed. According to Kay Cole James, "We were willing to put a lot on the table. At first I don't know if they really believed we had the authority to do that and could deliver. But we did."[89] NTEU President Colleen Kelly describes these interactions somewhat differently: "Any time I requested a meeting, we got a meeting. [...] [T]he issue was just that very often the conversation that would seem to me was going very well [...] and then we would leave the room, and they would go right back to where they started from."[90]

As the midterm elections drew nearer, however, the willingness of the administration to make deals or grant concessions decreased. NTEU's Maureen Gilman says, "We were working with Senators Chaffee, Nelson and Breaux to get a compromise. We were willing to give up virtually anything, [...] but as they got closer to the election they wanted this political issue. They did not want a compromise."[91] Brad Berenson seems to mirror this viewpoint from the other side.

> We were willing to make compromises and worked with some on the Hill such as Senators Nelson, Breaux, and Chaffee. At some point, Senator Daschle must have decided that he couldn't go into the elections without the public sector unions behind the Democrats, and he probably felt that the Democrats were safe on the security issue because of their support of the Iraq resolution. It was becoming clear that our efforts at reaching a compromise were being frustrated by the leadership. We were

[88] Tom Ridge, interview by authors, 17 January 2006.

[89] Kay Cole James, interview.

[90] Colleen Kelly, interview.

[91] Maureen Gilman, interview.

astounded, but tried to keep going. Finally, the [White House] Legislative Oversight Group decided to quit trying to reach an agreement. [...] Compromise could have been reached; we were willing to do things.[92]

No compromise was reached, however, and the issue remained undecided as Congress headed into the November elections.

2. The Issues

There were clear differences between the administration and the unions on real issues that were important for both. Each side also had a different perception what the fight was all about. The two major issue areas under debate were: (1) management flexibility to fix a broken personnel management system versus (2) collective bargaining agreements and the rights of organized workers.

For the administration and its supporters, the issue was about providing the "flexible" tools for management to use to deploy and manage employees in the new Department. Since the Bush administration had already begun to pursue a management reform agenda that included reforms in human capital management, HSA provided an opportunity for them to advance this agenda, and they took the opportunity. The administration believed that the entire federal government needed personnel management reform, but in this case, they argued that reforms were particularly necessary for the urgent mission of DHS. Rep. Portman said the President was asking for "some basic flexibilities in the area of pay, performance, classification and in appeals and adverse actions [...] the kind of managerial and the kind of personnel flexibility he's going to need."[93] Senator Fred Thompson argued

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[92] Brad Berenson, interview.

[93] Rob Portman, "Homeland Security Legislation."

that the mission of DHS required a new approach, "We can't operate the Homeland Security Department the way so many other departments have been operated with the waste and inefficiency that we've seen. So this is a monumental step in the right direction."[94]

During the debate, reform supporters were asked to provide examples that illustrated the need for personnel management changes. In response, the administration noted the difficulty in relocating people quickly, offered a hypothetical example of the difficulty in firing a drunken border guard, and cited union rules that interfered with workers wearing radiation detecting devices. All of these examples would themselves become problematic and debatable. Nevertheless, the administration's argument was supported by a widespread belief that the civil service system was rules-bound, unresponsive, outmoded and in need of improvement.

Union leaders saw this issue in a different light; they disputed the details of the proposal and also questioned the motives behind them. Brian DeWyngaert, Assistant to the President of AFGE, saw the reforms as an attempt by the administration to weaken the civil service system, to shift from "public administration" to "political administration."[95] DeWyngaert cites a paper, written by two former Republican personnel management officials, that asserts, "The President can expect opposition from official Washington's 'permanent government,' a network that includes the career civil service, and its allies in Congress, the leaders of federal unions, and the chiefs of managerial and professional

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[94] Senator Fred Thompson, "Congress Goes Back to Work," Interview, PBS *Online News Hour,* 12 November 2002.

[95] Brian DeWyngaert, interview by the authors, 19 January 2006.

associations representing civil servants."[96] DeWyngaert expresses union distrust of the

administration, arguing that the real goal of the administration was to "control what agencies

do [...] to change some of the personnel rules [...] to the point where they are going to follow

your line because you control their pay, their determination at will, their layoff."[97]

There were also questions about whether the administration had election-year politics

in mind. Since the administration had initially opposed creation of a new department,

Colleen Kelly suggests the White House had decided that if it were going to bow to pressure

from Congressional Democrats on this issue, they would "'put something in there to make it

really difficult for the Democrats […] as they move toward the next election.' And this was

the personnel provision."[98] But Bruce Lawlor denies any political motivation on the part of

the G-5: "there was never, for a minute, any political motivation behind trying to change the

civil service system [...] The only direction he [Card] ever gave us was 'Do the right thing.

You do what you think is right. We'll worry about the politics if it comes to that.'"[99]

Adding to the suspicions about motives, the revocation of the Clinton-era partnerships

and the denial of organizing rights at the Justice Department on national security grounds

gave reason for labor leaders to fear that the administration was pursuing an agenda to

weaken the federal unions. Colleen Kelly asserts, "The Homeland Security Act became the

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[96] George Nesterczuk, with Donald Devine and Robert E. Moffitt, *Taking Charge of Federal Personnel*, *Heritage Foundation*, 10 January 2001.

[97] Brian DeWyngaert, interview.

[98] Colleen Kelly, interview.

[99] Bruce Lawlor, interview.

vehicle that they had been looking for forever [...] to take away existing civil service rights.

[...] They saw their opportunity and they used it."[100]

This fight coalesced over the question of the President's authority to abrogate collective bargaining agreements if he deems it a national security necessity. Presidents have had this authority for over thirty years, but union leaders and their supporters feared its use by this administration. Rep. Robert Menendez (D-NJ) explained:

> A variety of rights—whistleblower protection, collective bargaining rights, and other important issues [...]—will in essence be subject to being waived by a presidential determination that this is a national security interest. [...] The reality is that the president earlier this year used those similar provisions in reference to the US Attorney's Office where over 500 individuals who were seeking to be unionized were suddenly taken away of all of their rights including their right to collectively bargain.[101]

The unions and their supporters tried to address this question through bill language that would restrict the President's authority. The original Lieberman bill contained very little language about management other than Section 106—which addressed sound financial and fiscal management principles and environmental, safety and health requirements.[102] A provision to limit the President's ability to abrogate union agreements on national security grounds was added to the Lieberman bill and on the House floor; Rep. Morella offered amendments to HR 5005 to address these union concerns. Senator Thomson argued the administration's position:

> Here is authority that presidents have had ever since the days of Jimmy Carter. Democrat and Republican presidents both have had a right to abrogate collective bargaining agreements in the interest of national

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[100] Colleen Kelly, interview.

[101] Rep. Robert Menendez, "Homeland Security Legislation," Interview, PBS *OnLine NewsHour*, 26 July 2002.

[102]Joseph Leiberman, "To Establish the Department of National Security and the National Office for Combating Terrorism," 107th Congress, 2nd Session, S. 2452, Library of Congress, 2 May 2002.

security on particular occasions. The president simply wanted to keep the same authority that these other presidents had.[103]

The efforts to amend the president's authority failed, but they fueled the key debate.

Colleen Kelley reflects:

> There was the collective bargaining issue, where there was a great deal of fear among the employees that were going to be put into the new department, that the President was just going to be able to issue an executive order and take away their bargaining rights. He clearly had that authority. We were trying to get a grandfather clause that said if your duties don't really change, the president can't just issue an executive order and take you out. I think things could have gone differently if we had not been pushing on the language to limit the president's authority. That's really what they picked up on.[104]

This debate, now framed as national security vs. labor rights, would be taken into the November elections.

3. Personnel Management Reform as an Election Issue

Homeland security did become an issue in the fall 2002 election campaigns. In particular, the campaigns of two Senate Democrats, Jean Carnahan (MO) and Max Cleland (GA), were affected by campaigns that accused them of opposing the HSA.[105] The midterm elections in Missouri and particularly Georgia became the most important elections for the Bush administration and its homeland security proposal. Campaign ads portrayed Senator Cleland, a triple amputee Vietnam War veteran, as anti-national security and pro-special interest.[106] President Bush visited Missouri several times in October and November to lend

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[103] Senator Fred Thompson, "Congress Goes Back to Work." Interview by Gwen Ifill on *PBS Online News Hour*, 12 November 2002, available online from http://www.pbs.org/newshour/bb/congress/july-dec02/lameduck_11-12.html

[104] Colleen Kelly, interview.

[105] Donald P. Moynihan, "Homeland Security," 181.

[106] Rich Lowry, "Max Cleland, Liberal Victim: Election Mythology," *National Review Online*, 20 February 2004.

support to Rep. Jim Talent's senatorial bid against incumbent Jean Carnahan, arguing at one campaign stop that "Jim Talent understands what I'm talking about. You put him in the Senate; we'll get us a good homeland security bill, which will make it easier for presidents to protect America."[107]

Colleen Kelly, President of the NTEU, reflected, "They framed those who were in the Democratic Party supporting us, and even the one or two Republicans or Independents who were on our side—to keep this thing alive—they framed them as unpatriotic."[108] John Gartland, dismayed that that the bill had not been voted on by the Senate prior to the mid-term election break, stated, "At that time, I thought we were dead, because I never realized what was going on in Georgia to defeat Cleland using this issue."[109] *Washington Post* columnist Stephen Barr observed, "The defeat of Max Cleland, a Vietnam war veteran who said that labor rights and employee rights should not be changed and who then goes down in defeat in his home state, left Democrats very embittered on this front."[110]

The election had its impact, but was introducing civil service reform into the homeland security bill part of a deliberate Republican election strategy? Colleen Kelly suggests that it was:

> They could put the Democratic candidates, especially in the Senate, on the hot seat for the election. They didn't have much at risk because their move to create a department was a defensive political move. [...] So they could

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[107] George Bush, "Remarks at Southwest Missouri State University," *Weekly Compilation of Presidential Documents*, Week Ending 18 October 2002, 1801.

[108] Colleen Kelly, interview.

[109] John Gartland, interview.

[110] Stephan Barr, interview by authors, 23 September 2005.

throw it out there and say, "OK Democrats, you're either going to hurt your union friends or you're going to vote to create this department."[111]

Senator Thompson denies that the issue was deliberately set up for the elections, saying, "I don't think anyone was holding out simply to have an election year issue." Nevertheless, Senator Breaux observed, "I can give you the names of a number of people who are not going to be back from Congress in January as a result of this issue. It was a big political issue."[112]

When the results from the midterm elections were in, the administration had gained a Republican majority in the Senate and enough support to pass H.R. 5005 with the management flexibilities provision intact.

4. The Return from the Mid-term Elections

Prior to the election, the Senate had been split 50-50 between Democrats and Republicans. The Democratic election losses in Georgia and Missouri, along with Republican victories in Minnesota and North Carolina, gave the administration the needed Republican majority in the Senate. Coupled with Republican gains in the House, the election results were broadly interpreted as a national judgment on Bush's stand on homeland security.[113] Passage of the HSA did not have to wait for a new Congress to be seated in January, however. Instead, Congress returned for a rare post-election "lame duck" session to take up the HSA. John Gartland explains, "It [the elections] sent a message back here. A bunch of other Democrats and Republicans, they quickly got along, and they passed that bill.

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[111] Colleen Kelly, interview.

[112] Senator Fred Thompson, "Congress Goes back to Work."; Senator John Breaux, "Congress Goes Back to Work," interview, PBS *Online NewsHour*, 12 November 2002.

[113] Conley, "The Department of Homeland Security," 6.

'Get it out of here! Look at what happened to Cleland and others'."[114] Colleen Kelly,

president of NTEU, also credited the election results as leading to passage of the bill:

> Well, in the end it went through because of the mid-term elections. I like to think we'd still be fighting about it even if it was a very narrow margin keeping the debate alive. So, the only reason it ended was because of the results of the mid-term election. And seeing people like Max Cleland being portrayed as unpatriotic because he supported the rights of the employees who provide the protection on the front lines everyday. I'll never forget those mid-term elections. I knew that night what was going to happen. And it did. You know, within two weeks they acted on the legislation.[115]

After the elections, the House language was generally just inserted into the Senate

bill, and last-minute compromises were reached on some key issues. A final deal struck

between the White House and Senators John Breaux (D-LA), Ben Nelson (D-NE) and

Lincoln Chaffee (R-RI) provided that DHS would collaborate with unions before any rule

changes and that the President must notify Congress and wait ten days before waiving union

agreements for national security reasons. Such waivers would be limited to a four-year

period

The final language on personnel management therefore amounted to considerably

more than the original proposal. Title VII, Subtitle G, Section 761 adds a new Chapter 97 to

Title 5 for the management of personnel in DHS. It includes the broader language of the

House bill as further amended in the Senate. In addition, a significant other amendment,

championed by Senator George Voinovich (R-OH) incorporated as Title XIII of the HAS,

establishes new Chief Human Capital Officers (CHCO) throughout the agencies of the

federal government. It also sets new requirements for OPM to establish systems, standards,

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[114] John Gartland, interview.
[115] Colleen Kelly, interview.

and metrics for assessing the management of human capital. Though managerial in its focus, the CHCO provision can be viewed as an additional civil service reform, applicable government-wide, accomplished through the vehicle of the HSA.

The authority for the secretary and director of OPM to establish a new personnel management system for DHS was retained. Senator Fred Thompson, Ranking Republican on the Government Affairs Committee said:

> The president wanted for the administration to be able to put into effect some new rules and regulations. Workers rights are still going to be protected [...] but it takes too long to hire. It takes too long to get rid of people who need to be moving on. It takes too many levels of appeals and so forth. The president needed some flexibility. He will be given that flexibility now.[116]

On the Senate floor, Senate Amendment (S. Amdt.) 4901, the final HSA language was proposed by Senator Thompson. In a last ditch effort to block the bill, Senator Lieberman proposed S. Amdt. 4902 to create instead a National Commission on Terrorist Attack upon the United States. A cloture vote was passed 65-29 to limit debate and permit the vote. S. Amdt. 4901 passed in the Senate 90-9 on November 19. The House of Representatives subsequently passed it on November 22nd. President George W. Bush signed PL. 107-269 on November 25, 2002.

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[116] Senator Fred Thompson, "Congress Goes Back to Work."; Senator John Breaux, "Congress Goes Back to Work."

President George W. Bush addresses the media during the signing of the Homeland Security Act in the East Room Monday, November 25. White House photo by Paul Morse.

IV. Argument Comparison Before and After 9/11

A. Introduction

In the previous chapter, we described the chronology of events that led to the passage of the HSA of 2002, including the recent history of attempts at civil service reform since the Civil Service Reform Act (CSRA) of 1978. Within the context of this case history, we introduced some of the key arguments made by both proponents and opponents of the personnel management reforms. Interestingly, many of the proponents' arguments had been made by previous administrations but had not led to legislative and organizational changes. Several interview participants suggested that national security and 9/11 played a large role in the adoption of proposed personnel management reforms in the HSA. Consequently, we set out to investigate more closely the claim that 9/11 and national security were key to the passage of personnel management reforms.

The following chapter explores whether and how the arguments in this case differ from that of previous reform attempts.

B. Materials and Method

1. Materials

To examine the arguments for personnel management reform, we consulted a variety of materials in the public record that illustrated both sides of the debate. Specifically, we searched for sources using research databases such as Lexis Nexis, Proquest, JSTOR, and the Homeland Security Digital Library, and we drew from a variety of materials including newspapers, scholarly reports, speech transcripts, congressional hearings, and other public accounts. Although we consulted many sources (including interview data) to gain general

background into the debate, we limited our actual data set to only those arguments that could be directly attributable to a specific source and are available in the public record. By limiting our data to directly attributed material, we reduced the risk of imposing third-party interpretation of specific arguments and instead only analyzed the terms of the argument as made by the original author/speaker/organization. In many cases, our evidence for arguments was in the form of direct quotations taken from hearings, speeches, press briefings, or other public events. In other cases, we relied on "talking points" issued as the official position of a participant in the debate, such as the American Federation of Government Employees (AFGE) union. In all cases, we consulted only those arguments that were in the public record. There is a particular utility in restricting our data to only those arguments made publicly; namely, such arguments would most likely be those which were circulated in the public sphere. In other words, in comparing the arguments both before and after 9/11, it is important to view the debate as the public viewed it in order to examine the potential effects of the arguments on those audiences.

2. Method

Once we gathered the materials for analysis, we reviewed the arguments categorizing them first as having been made either before or after 9/11, and second as either for or against personnel management reform. We then categorized the arguments into 10 primary themes to assess which arguments, if any, were distinct to each time period either prior to or following 9/11. It is important to note that many of the arguments were related to one another; however, we categorized the arguments into themes based on those that seemed to be particularly prevalent throughout the debate. Our search for arguments reflects our intent to capture the entirety of the debate to the greatest extent possible. Whereas we may have missed some

sources in our search, we are confident that the primary, recurring arguments in the debate are reflected in our analysis.

We make extensive use of italics throughout the analysis as a means to emphasize certain key points in the arguments. All use of italics, therefore, indicates our emphasis rather than the original speakers', unless otherwise noted.

B. Findings

Our analysis resulted in the isolation of 10 primary arguments, summarized as follows:

(1) Strategic Human Capital Management
(2) Modernization
(3) Flexibility
(4) Accountability
(5) Broadbanding and Paybanding
(6) Pay-for-Performance
(7) Recruitment and Retention
(8) Union Busting
(9) The Party Line: Democrats vs. Republicans
(10) National Security

Table 1, below, summarizes our findings. The sections that follow provide a narrative comparison of all arguments for personnel management reforms.

Table 1. Issues of contention between proponents and opponents of personnel management reform, their existence pre- and post-9/11, and a summary of primary arguments

Issue	Pre-9/11	Post-9/11	Primary Arguments	
			Reform Proponents	**Reform Opponents**
Strategic Human Capital Management	Yes	Yes	Need to change system to better manage human capital	Safeguards exist within current system for managing human capital; training needed, not reform
Modernization	Yes	Yes	Current system is outdated and needs to be replaced	Proposed changes were a regression back to old systems where managers had too much authority
Flexibilities	Yes	Yes	Department needs management flexibilities to transform system, be responsive	Particular flexibilities sought would undercut employee rights, overly empower Executive branch and management
Accountability	Yes	Yes	Need for employee accountability demanded overhaul of system	Current system already ensured employee accountability
Broadbanding/ Paybanding	Yes	Yes	Broadbanding would improve recruiting and retention of good federal employees	Broadbanding is overly subjective and does not have strong enough history of success
Pay-for-performance	Yes	Yes	New system would reward performance and motivate employees	New system would compromise teamwork and encourage management favoritism
Recruitment and Retention	Yes	Yes	Current system has outmoded hiring and retention strategies; new merit-based system needed to hire/retain top talent	Biggest barriers to recruit/retain workers are trends toward outside contractors and lagging pay, not hiring or retention processes
Union busting	Yes	Yes	Union protections would remain intact—even enhanced—under the new system	Reform efforts aimed at destroying union power and union representation for employees
Arguing along Party Lines	Yes	Yes	Republicans generally took the position of sweeping reforms	Democrats generally sided with the union position of fewer or more moderate reforms
National Security	No	Yes	**Proponent arguments that were made before 9/11 resurrected after 9/11 with new rationale of national security**	**Challenged national security arguments as disingenuous; hurt employees and, thus, hurt national security**

1. Strategic Human Capital Management (SHCM)

A prevailing theme within the data involved the concept of strategic human capital management (SHCM). SHCM is a broad concept that can encompass many of the arguments that follow. However, we note it as the first theme here because it was often characterized, by both sides in both time periods, as a general rationale for various positions. The GAO report, *High-risk Series: An Update*, of January 2001 added SHCM to its list of government functions that were designated as high risk. The government's approach to managing its people—its human capital—is presented as the critical missing link in reforming and modernizing the federal government's management practices.[117] In the pre-9/11 time period, reform advocates provided numerous arguments that stated SHCM was an area of government service that needed to be reformed. For example, the GAO report stated, "Serious management challenges across a wide range of federal agencies, covering programs that involve billions of federal expenditures, can be attributed to shortcomings in how agencies manage their *human capital.*"[118] Reform opponent Bobby Harnage, AFGE President, also engaged in this argument, largely agreeing on the need to focus on human capital in the federal government. However, he countered the claim for the particular reforms being proposed and, instead, advocated for better employee training within the existing system: "The idea of performing at one's best gets to the issue of *organization performance* through *developing the workforce's skills and knowledge*. […] Like a lot of *reinvention*

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[117] United States Government Accountability Office, *High-risk Series*, GAO-01-263, (Washington, DC: author, January 2001).

[118] Ibid., 8.

concepts, it is likely that we're at a point where the importance of training is not fully understood by Executive Branch agencies, at least not in a strategic sense."[119]

The arguments for SHCM in the post-9/11 timeframe are similar in nature to those from the pre-9/11 era. For example, Tom Ridge was quoted as saying that the goal was to create a "contemporary, flexible *human resource system* based on the principles of merit and fairness […] in the civil service system."[120] Opponents of reform in the post-9/11 era acknowledged the SHCM argument, but again challenged the effectiveness of the particular reforms being called for by proponents. For example, NTEU President Colleen Kelly stated, "The GAO and others have repeatedly warned Congress that the federal government faces a *human capital crisis.* […] How will the DHS be able to retain its most experienced employees when they [employees] will be faced with the possibility of *losing the rights and benefits* they have enjoyed for their entire career?"[121]

The use of human capital management as an issue in the arguments for and against reform was presented by both sides, in both time periods. Reform advocates claimed that the government should change the system to better manage its human capital, whereas reform opponents advocated that there were already safeguards within the current system to manage human capital challenges, but that training should be a critical component to SHCM.

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[119] Bobby Harnage, "Training Employees to be their Best," testimony before the Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, Senate Committee on Governmental Affairs, 18 May 2000.

[120] Ellen Nakashima and Bill Miller, "Bush to Ask Workers for Flexibility on Homeland Security: President's Pep Talk to 3,000 Employees to Include Appeal on Civil Service Rules," *The Washington Post*, 10 July 2002, 15.

[121] Committee on Ways and Means, Hearing Before The Committee On Ways and Means House of Representatives One Hundred Seventh Congress Second Session, 107-74, (Washington, DC: Congress, 26 June 2002).

2. Modernization

The GS pay system was originally developed in the 19th Century, and the CSRA attempted to modernize the system somewhat. The case for further modernization was an issue addressed by both sides in the debate in both time periods. For example, pre-9/11, Vice President Al Gore stated during a campaign speech that "We find time and again federal organizations have bound themselves to *old, outdated, self-defeating practices* […] It's as if the old culture is an invisible cage that constrains thinking, cramps attitudes and lowers horizons."[122] We could find no specific mention of modernization in this time period by civil service opponents. However, opponents consistently asserted that the current system provided the means to accomplish many of the reformers' goals; consequently, it is plausible that opponents would take issue with an argument that the system was as outdated as reform proponents claimed.

Modernization was an issue addressed more specifically in the post-9/11 period. As an advocate for the reforms being proposed, Georgia Democratic Senator Zell Miller argued, "When it comes to choosing between an *aged, arthritic civil service* system filled with s*tumbling blocks and booby traps* or an agile agency that is nimble, this American stands with my president,"[123] referring to President Bush's advocacy of reform measures. However, post-9/11 reform opponent John Gage argued that the reforms were regressive: "they are

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[122] Stephen Barr, "Gore Reconsiders Project to 'Reinvent' Government; New Plan Would Retool Agencies One By One," *The Washington Post*, 17 November 1996, A19.

[123] David Firestone, "Unlikely Power Broker on 'Homeland' Plan's Fate," *New York Times*, 19 September 2002, A25.

encouraging a *management of coercion and intimidation*. This is not a *modern system*. This is a step backward."[124]

Modernization of the civil service was a theme raised in both time periods. Reform advocates argued that the current system was outdated and needed to be replaced, and reform opponents argued that the proposed changes were a regression toward old systems that allowed managers too much authority.

3. Flexibility

The use of the key word *flexibility* was the prevailing descriptor used in the arguments for or against civil service reform. The term is used in the legislative language of the HSA and was a focal point of the arguments in both time periods. Partly at issue was the definition and implications of the term "flexibility." Reform advocates argued that managers needed to have flexibility to hire, pay, and manage civil service employees. For example, Alvin S. Felzenberg, Virginia L. Thomas and Robert E. Moffit of the Heritage foundation argued that major civil service reform was needed "to *improve flexibility in staffing* the civil service, with an *emphasis on changing the culture* from one of bureaucratic tenure to high-performing public service and establishing *new pay and benefits packages that are flexible, generous and portable*."[125] However, reform opponents argued that such flexibilities eroded the employees' rights. For example, Harnage said:

> If statutory protections are eliminated in order to make aspects of federal compensation "*flexible*" in the sense of *being susceptible to change implemented unilaterally by management*, the *absence of collective bargaining rights* would

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[124] Christopher Lee, "Civil Service System on Way Out at DHS," *The Washington Post*, 27 January 2005, A5.

[125] Stephen Barr, "When It Comes to Civil Service, Everybody Has an Opinion: Change It," *The Washington Post,* 18 March 18, C02.

deprive federal workers of any democratic process through which to make our voices heard. An expansion in collective bargaining rights, then, would be a necessary component of any expansion in management rights.[126]

Post-9/11 reform advocates continued to argue the necessity of management

flexibilities. For example, White House spokesman Ari Fleischer said that the president "has

made it very clear" that he would not endorse any legislation that "doesn't *adequately protect*

the country with the flexibility that the work force *needs to do their job well*."[127] However,

Joseph Lieberman—an advocate of certain civil service reforms who nonetheless took issue

with the some of the reforms being proposed by the Bush administration—also challenged

the need for the proposed flexibilities: "if granted, the president's pleas for *additional*

'flexibility' would give his administration *unprecedented power to undercut the civil service*

system, rewrite laws by fiat and spend taxpayers' money without congressional checks and

balances."[128]

The argument about management flexibilities was present in both time periods. Bush

reform advocates argued that such flexibilities were necessary to transform the civil service

system. Bush reform opponents argued that the particular flexibilities being sought would

undercut employee rights and give too much power to management and the Executive

branch.

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[126] Bobby L. Harnage, "Expanding Flexible Personnel Systems Governmentwide," testimony before the Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, Senate Committee on Governmental Affairs, 17 July 2001.

[127] David Firestone, "Bush Is Thwarted on Worker Rights," *New York Times*, 25 September 2002, A11.

[128] Barbara L. Schwemle, *Homeland Security: Human Resources Management*. RL31500, (Washington, DC: Congressional Research Service, the Library of Congress, 5 September 2002).

4. Accountability

The theme of employee accountability was another argument evident in both time periods. During a campaign speech in the pre-9/11 time period, then Texas Governor George W. Bush argued for need for civil service reform: "With a system of rewards and *accountability*, we can promote a culture of achievement throughout the Federal government."[129] Whereas the specific issue of accountability was not as evident in public remarks by reform opponents prior to 9/11, unions have traditionally argued that such accountabilities were already part of the current system. The issue of accountability was raised explicitly post-9/11, by both reform advocates and opponents. For example, during hearings in the United States Senate's Governmental Affairs Committee, Senator Fred Thompson, ranking Republican member stated, "Homeland security is too important not to have a high-performance, *accountable* workforce."[130] However, current AFGE president John Gage challenged the implication that the current system didn't hold employees accountable: "*Unacceptable performers are fired.* It's not factual that poor performers are allowed to languish in jobs that could be held by better performers."[131]

Employee accountability was an issue addressed by both sides in the debate: reform advocates argued that the need for accountability demanded an overhaul of the system, while opponents argued that the current system already provided such accountabilities.

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[129] Stephen Barr, "Don't Worry about the Job Cuts in Bush's Plan, Adviser Says: Think Hefty Bonuses," *The Washington Post*, 12 June 2000, B02.

[130] Charlie Mitchell, "Senators Question Bush effort to Loosen Civil Service Rules," *Government Executive*, 20 June 2002.

[131] John Gage, "New personnel system invites favoritism, cronyism says Union President," AFGE Press Release, 2 November 2005.

5. Broadbanding and Paybanding

Broadbanding and Paybanding were introduced as alternatives to the General

Schedule (GS) system both before and after 9/11. Broadbanding refers to the grouping of GS

grade levels into fewer, broader levels of work with wider salary ranges. Usually a limited

number of occupational families are identified and a set of ranges or bands is tailored for

each family.[132] The pre-9/11 proponents of broadbanding argued that the new process would

allow government more flexibility to hire and retain better federal workers. For example,

Myra Shiplett, Director of the Center for Human Resources Management at the National

Academy of Public Administration, advocated for the program: "The [broadbanding]

approach has been extensively monitored and evaluated by the US Office of Personnel

Management, which has reported in numerous studies over the last two decades that the

laboratories have been able to recruit and retain quality employees at higher rates than the

traditional system."[133] This point emphasized the need to use broadbanding/paybanding as a

means to improve the government workforce. Although the broadbanding/paybanding issue

was not as prevalent in the popular press pre-9/11, there was some evidence of the

opponents' position on the issue. For example, an issue paper from the AFGE Local 2113

web site noted:

> 'Pay Banding' is an experimental pay system different from the GS-series pay system
> in that an employee receives raises in accordance with his performance evaluations as
> determined by his supervisor. While at first this may seem attractive, assuming a top

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[132] Bryce Baker, OPM, e-mail to author, June 5, 2006.

[133] Myra Shiplett, "Hearing on Expanding Flexible Personnel Systems Governmentwide," Congressional Testimony, 17 July 2001.

performer will enjoy accelerated pay promotion, the entire process is subjective and has disadvantages. [134]

In the post-9/11 time period, David Walker, US Comptroller General, stated there is a need for greater flexibilities such as broadbanding. Drawing on a recent OPM whitepaper released by Kay Coles James, Walker asserted:

> the greater use of broadbanding is one of the options that deserve to be discussed. In the short term, Congress may wish to explore the benefits of providing OPM with additional flexibility that would enable it to grant government-wide authority for all agencies to use broadbanding for certain critical occupations and/or allowing agencies to apply to OPM for broadbanding authority for their specific critical occupations."[135]

However, the post-9/11 opponents disagreed that paybanding/broadbanding was an effective system. NTEU's Colleen Kelly argued that the system was unproven as an effective measure: "It is a mystery to me *where the evidence is that these systems* [paybanding/broadbanding] *have produced successes* to justify putting them in place throughout the federal government."[136]

The concept of broadbanding and paybanding was an argument in which both proponents and opponents engaged, both before and after 9/11. Proponents argued that such a system would improve recruiting and retention of federal employees, whereas opponents argued that the system was overly subjective and did not have a strong enough history of success to warrant implementation into the federal government.

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[134] American Federation of Government Employees Local 2113, "AFGE Local 2113 Position on Pay Banding." Orlando, FL. Available from http://www.mindspring.com/~afge2113/issues/paybandg/payband.htm. Accessed 10 April 2006.

[135] United States Government Accountability Office, "Managing for Results," *Using Strategic Human Capital Management to Drive Transformational Change*, GAO-02-940T, July 2002.

[136] Colleen Kelly, "Leadership, Not New Pay Systems, Determine Agency Success, NTEU Leader Tells Key Senate Subcommittee," *NTEU Press Release*, 27 September 2005.

6. Performance-based Pay

Broadbanding/paybanding facilitated another attempt at performance-based pay. This new compensation concept replaced the traditional longevity-based step increase system with yearly performance-based pay raises. Advocates argued that this would make the federal workers more efficient and would improve the work place. For example, pre-9/11, Bush campaigned on this issue and noted his support for pay-for-performance systems:

> We must have a government that thinks differently, so we need to recruit talented and imaginative people to public service. We can do this by reforming civil service with a few simple measures. We'll establish a meaningful system to measure performance. Create awards for employees who surpass expectations. Tie pay increases to results. With a system of rewards and accountability, we can promote a culture of achievement throughout the Federal government.[137]

This argument emphasizes the belief that a new system of rewarding performance will increase the productivity of the federal workers. The pre-9/11 opponents, however, contended that the new pay-for-performance systems would undermine performance. For example, prior to 9/11, in a hearing before the Senate Committee on Government Affairs, Harnage argued that such systems pit employees against each other:

> One of the main ideas behind this "flexible" pay-setting system was to foster teamwork and improve performance. However, with its overemphasis on the contribution "scores" of individuals, and its "best to worst" ranking of employee performance, [a pay-for-performance system] crudely pits one employee against another for a finite amount of money. One co-worker's loss is another's gain—and an "each man for himself" environment is created. [138]

Post-9/11, Kay Coles James argued the merits of the proposed pay-for-performance system: "First, the Government needs to convey to its employees an unequivocal message that

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[137] Stephen Barr, "Don't Worry," 12 June 2000.

[138] Bobby L. Harnage, "Expanding Flexible Personnel Systems," 17 July 2001.

performance matters. Second, linking pay to performance will focus agency and employee attention on performance management."[139] In addition to the teamwork problem noted pre-9/11, reform opponents post-9/11 argued that the new system would give too much power to managers to determine pay. For example, AFGE argued:

> The merit system principles include prohibitions on political favoritism in and discrimination in hiring and firing, pay based on market data and job duties, not favoritism […] None of these principles can be effectively enforced or upheld when political appointees and the managers who answer to them are given unchecked authority to hire, fire, set pay, award contracts, and prohibit workers from seeking union representation through collective bargaining.[140]

Pay-for-performance was an argument that appeared in both time periods. Advocates argued that the new system would reward performance and, thus, motivate and retain good government employees. Opponents argued that the new system would compromise teamwork and encourage favoritism.

7. Recruitment and Retention

Numerous sources, on both sides of the debate, expressed concern about the ability to recruit and retain high-quality and top-performing government employees. This concern was due, in part, to the looming retirement of many current workers. Reform proponents argued that retention was difficult without a better system to link pay with performance. Additionally, reform proponents argued that the current process takes too long to hire critically needed personnel, which in their view impacted the ability to hire top candidates. For example, John M. Palguta, Director of Policy and Evaluation at the Merit Systems

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[139] Kay Coles James, "A Fresh Start for Federal Pay: The Case for Modernization," US Office of Personnel Management White Paper (Washington, DC: April 2002), 64.

[140] American Federation of Government Employees, *Homeland Security Talking points*.

Protection Board (MSPB) wrote that the government "is severely *limited in its ability to compete for highly qualified candidates* in at least some occupations and geographic areas." He argued that government needs to adopt a personnel strategy that "deals with . . . *ineffective or outdated recruitment strategies*, and the lack of a coherent approach to employee selection and hiring *that leaves applicants and would-be applicants baffled and frustrated*."[141] Although reform opponents agreed that there were problems with recruiting and retention, they attributed the problems to different factors. For example, Harnage argued that the government trend towards contracting work to non-federal workers created pay-equity concerns and fears of job loss by current and future government workers:

> the government needs to provide federal employees with compensation that is comparable to and competitive with that paid by other large private- and public-sector employers, eliminate arbitrary Full Time Equivalent (FTE) ceilings and hire according to agency mission needs, and end the practice of contracting out all new federal work and privatizing work that has been performed efficiently and competently by skilled and dedicated public employees.[142]

The arguments are similar in the post-9/11 time period. For example, in the November 2001 *Issues of Merit*, the MSPB highlighted some of the problems it saw with the "rule of three," which requires the selection of one of the top three eligible hires. One such problem the report cited was the way ties are broken in the current system: "if there are more than three candidates tied for the highest score, tie breakers must be used to get down to only three. Random selection based on social security number is usually used in such cases. This is *hardly an example of sound merit-based selection*, and it's difficult to argue that it gives

[141] Stephen Barr, "'High Risk Update' May Point a Finger at Hiring, Recruitment Strategies," *The Washington Post*, 16 January 2001, B02.

[142] Bobby L. Harnage, "Expanding Flexible Personnel Systems," 17 July 2001.

managers truly meaningful choices."[143] Reform opponents argued that the issues affecting

recruitment and retention could be addressed within the current system. For example, the

AFGE argued that providing employees adequate compensation was key: "by ensuring that

federal employees are treated and compensated fairly, *unions can help agencies address*

recruitment and retention problems."[144]

Recruitment and retention were issues of concern for both sides of debate in both time

periods. Reform proponents argued that current system had outmoded hiring and retention

strategies, preventing the ability to recruit and retain top candidates. Reform opponents

argued that the biggest barriers to recruitment and retention were the trend toward

contracting and lagging compensation for federal workers.

8. Union Busting

The concept of union busting became more prevalent in the post-9/11 period, but

there was some evidence of the argument pre-9/11 as well. This argument was made

primarily by reform opponents. For example, a 1998 reform proposal included a provision to

restrict "official time" spent on union activities. Harnage called this particular reform

measure an attempt to "put us [unions] *out of business*."[145] We could find no public response

to the union-busting claim specifically by reform advocates in the pre-9/11 period.

In the post-9/11 time period, reform advocates more openly refuted the charge that

their reform measures amounted to union busting. For example, Kay Coles James asserted

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[143] US Merit Systems Protection Board, "Categorical Grouping Treats Veterans Better than the Rule of Three," *Issues of Merit,* (Washington, DC: Office of Policy and Evaluation, November 2001), 4.
[144] American Federation of Government Employees, *Homeland Security Talking points*.
[145] Ben White, "Civil Service Changes Stall in House; After Objections on Performance Issues and Union Activity, Bill is Scaled Down," *The Washington Post¸* 20 July 1998, A15.

that "while the administration is seeking some civil service reforms, contrary to AFGE assertions, major issues such as *collective bargaining rights are actually enhanced by the legislation* passed by the House. That legislation guarantees those rights when employees are transferred to DHS."[146] However, reform opponents argued the administration was attempting to compromise union power. Gage, for example, argued that the need to bypass unions for the sake of national security was "disingenuous," and merely an excuse to "remove employee's rights."[147] A *Washington Post* editorial asserted a similar sentiment: "it would be nice to believe the administration's *fervent denials of a plot to destroy the mostly Democratic unions*. But before we do, we'd like to see some clearer arguments from the administration about what the *elimination of union bargaining* has to do with either the nation's safety or civil service performance."[148]

Union busting was an argument evident in both time periods. Reform opponents charged that many of the personnel provisions in the reform efforts were aimed at destroying or undercutting union power. Reform advocates rebutted this claim and argued that union protections would remain intact—even enhanced—under the new system.

9. The Party Line: Democrats vs. Republicans

Throughout the debate in both time periods, reform advocates and reform opponents argued that reform proposals were adopted or defeated along party lines. For example, pre-9/11 there was a Republican bill introduced in the House for reforms that would have created

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[146] Kellie Lunney, "Administration Already Has Homeland Security Flexibility, Union Says," *Government Executive*, 28 August 2002.

[147] "Civil Service Reform," *The Washington Post*, 31 January 2005, A20.
[148] Ibid.

performance-based compensation and an easier termination policy for removing poor performers. In response, Rep. Elijah Cummings (D-MD), offered a Democratic counter proposal; neither side was happy with the others' proposal, and the support for each version was drawn primarily along party lines. Despite efforts at compromise, Rep. Dan Mica (R-Fl), the sponsor of the Republican bill, was quoted as having claimed that "Cummings proposal represented a *total dismemberment of the original bill.* It's sort of the meat of our proposal, and they [Democrats] oppose just about all of it."[149] For his part, Cummings argued that they [Democrats] would "continue […] in a bipartisan way to bring about positive change for the federal workforce, but many provisions remain in the [Republican] proposal that I, the administration, and/or the employee organizations oppose."[150]

Post-9/11, arguments along party lines were more explicit and pronounced. Reform advocates argued that Democrats were choosing union support over the needs of national security. For example, Republican Senate Leader Trent Lott asserted, "The homeland security department is being *blocked by Senate Democrats who are determined to protect the interests of their union bosses* in the bureaucracy."[151] Reform opponents, however, charged that Republicans were putting too much power in the hands of managers: Senator Tom Daschle called the Republican bill a "*power grab of unprecedented magnitude*" over civil service rights.[152]

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[149] Ben White, "Civil Service Changes Stall."

[150] Ibid.

[151] Richard W. Ryan, "The Department of Homeland Security," 107.

[152] David Firestone, "Traces of Terror: the Reorganization Plan; Congress Returns from Recess, and So Does the Partisanship," *The New York Times*, 4 September 2002, A11.

The arguments were made along party lines. Democrats generally took on the union position, supporting fewer or more moderate reforms, and Republicans generally took the position advocating sweeping reforms. This party cleavage was evident in both time periods. Civil service reform, both before and after 9/11, cannot be so neatly divided along party lines, of course. For instance, presidents of both parties have proposed reform. Nevertheless, the partisan challenges played a role in the debate, both before and after 9/11.

10. National Security

The final theme involves the argument of national security as a rationale for civil service reform. Consistent with the claims made by several people involved in the post-9/11 reform effort, the key difference in the arguments for personnel management reform post-9/11 was in the link made between national security needs and management flexibilities. Based on our literature review, we could find no arguments, pre-9/11, which asserted such a connection. Post 9/11, however, the national security argument was prevalent throughout the debate. For example, in a Brookings Forum that explained the White House plan for reform, Richard Falkenrath argued the importance of homeland security and the subsequent need to have management flexibility in the Department: "*no goal is higher* or more important than the Department of Homeland Security, and to *secure the homeland we need this flexibility*. So, that's why we're adopting this department-specific flexibility."[153] Reform opponents, however, took issue with the claim that federal employees, under the current system, compromised the needs of national security. For example, Harnage argued that the proposed reforms robbed employees of their rights, which created an insecure workforce that

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[153] Richard Falkenrath, "Homeland Security: The White House Plan Explained and Examined," *Brookings Forum* (Washington, DC: The Brookings Institution, 4 September 2002), 33.

compromised national security: "When public employees' *rights and protections are compromised*, so too is the *safety and security of the public* they serve. [...] *Homeland security requires a secure work force* with employees who can be certain that *they, too, will be protected* from politics and favoritism and from punishment for speaking out against any mismanagement they witness."[154]

We were drawn to investigate this argument in more detail. Specifically, we were interested in examining more closely the potential persuasive effect of the national security argument, as it appeared to be the pivotal issue on which the fate of personnel management reform seemed to depend. Was it true, as James Lewis from the Center for Strategic and International Studies argued, that discussions of national security may have made opposition more difficult? In his words, he asserted, "Neither party is going to want to get caught with the other one saying, 'Look, they're obstructing homeland security.' That's where they're not going to be as willing to question or criticize as much as they would otherwise."[155]

Lewis illustrates the key issue of contention that would indeed prove to be critical in the passage of the personnel management reforms as part of DHS.

D. Conclusion

In this chapter, we carefully examined arguments for and against civil service reforms, both prior to and following 9/11. Specifically, we provided evidence of nine arguments that were present in both time periods: (1) Strategic Human Capital Management, (2) Modernization, (3) Flexibility, (4) Accountability, (5) Broadbanding and Paybanding, (6)

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[154] Gail McCallion, "Homeland Security: Data on Employees and Unions Potentially Affected," *CRS Report for Congress,* RS21268, 9 January 2003.
[155] Bob Williams and David Nather, "Homeland Security Debate: Balancing Swift and Sure," *CQ Weekly*, 22 June 2002, 1642.

Pay-for-Performance, (7) Recruitment and Retention, (8) Union Busting, and (9) The Party Line: Democrats vs. Republicans. The final argument, (10) National Security, was the only argument found to be unique in the post-9/11 period. This finding provided us with the impetus to examine the national security argument in more detail.

Interestingly, many of the arguments that existed prior to 9/11 were resurrected with new force in light of national security concerns. For example, while the need for management flexibility has always been a cornerstone argument for reform proponents, the rationale of doing whatever was necessary to secure the nation provided additional rhetorical emphasis that would prove to be highly persuasive. In the next chapter, we examine the rhetorical implications of the national security argument in detail. This analysis helps to explain why reform associated with HSA succeeded while other, previous reforms failed.

V. National Security: A Rhetorical Analysis

A. Introduction

Our analysis of the publicly available data suggests that an argument linking personnel management reforms and the needs of national security was unique in the post-9/11 era compared with the arguments of pre-9/11 reform attempts. Consequently, this argument was plausibly a key factor in the passage of the civil service provisions in the Homeland Security Act (HSA) of 2002. Several key people involved in the HSA legislation also asserted a strong connection between the events of 9/11 and enactment of personnel management reforms. For example, John Gartland, Director of Legislative Affairs at OPM said "It never would have passed. […] Without 9/11, this [reform] would never have seen the light of day."[156] So, how, specifically, did personnel management reform become dependent on national security? In this chapter, we explore the argument in detail, examining the rhetorical force of the national security argument.

B. Analysis of the National Security Argument: Method

One effective approach for analyzing arguments and their potential effect is to examine the metaphors embedded within them. Far from being mere ornament, metaphors structure how people think in that they invite audiences to view persons, places and situations in particular ways.[157] Robert L. Ivie, in his article "Metaphor and the Rhetorical Invention of Cold War 'Idealists,'" provides a useful approach for examining the persuasive and rhetorical effect of metaphors. According to Ivie, metaphor provides a key for understanding rhetorical

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[156] John Gartland, interview.

[157] George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 2003).

invention, whereby an image conveyed in an argument "produces an […] interpretation of reality, with which the intended audience is invited to identify."[158] Through metaphor analysis, we can gain insights into how arguments may invoke particular audience responses and, consequently, we can better understand some of the persuasive characteristics that may have impacted the successful outcome of the legislation.

Ivie describes a general process for identifying key metaphors. First, an analyst needs to be familiar with the text and context within the topic of interest. We gained this familiarity through interviews, research, and the analysis conducted in chapter three. Second, the analyst performs several close readings of the selected materials to identify and extract the metaphors employed by the speaker. Third, the analyst subdivides similar metaphors into themes, which are then classified as "metaphorical concepts." Finally, each metaphor is examined within each theme to identify patterns of usage.[159]

In political discourse, the use of language and metaphor can influence the receivers of the message, possibly influencing how people vote or adopt a position on a particular issue. George Lakoff has written recently on the relationship between metaphor and politics, arguing that metaphors affect unconscious reasoning and inference making.[160] We argue in this study that underlying metaphors, within the arguments from reform advocates and opponents, played a role in shaping public opinion, thus clearing the way for reform legislation that had repeatedly failed prior to 9/11.

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[158] Robert L. Ivie, "Metaphor and the Rhetorical Invention of Cold War Idealists," in *Readings in Rhetorical Criticism* (State College, PA: Strata Publishing, Inc., 2000), 351.

[159] Ibid., 352.

[160] George Lakoff, *Moral Politics: How Liberals and Conservatives Think* (Chicago: University of Chicago Press, 2002).

C. Findings

    1. Representing each side in the debate: Collective "Agents"

Upon our review of the data, we saw a pattern emerge as to how both sides in the controversy were constructed in the arguments. Although there were many quotes from different spokespersons on each side, the collective perspectives gave rise to what we term as two representative *agents* for each side, one representing reform advocates and one representing reform opponents. The reform advocate agent, for example, included perspectives expressed by President George W. Bush and his administration, various representatives of the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), and others who argued for an overhaul of the existing personnel management system. On the other side, the reform opponent agent included perspectives expressed by union leaders, many legislators who supported the union position and others who opposed the sweeping reform measures being proposed by the Bush administration. The multiple perspectives, within each side of the debate, shared similarities such that a unified agent for that perspective emerged as the embodiment of a position either for or against personnel management reform. Our analysis revealed two distinct agents being invoked which we label as follows: The Administration Agent (the advocates of reform) and the Union Agent (the opponents of reform).

The Administration Agent (hereafter referred to as "Administration") is the proponent for civil service reform. This agent is constructed as one who expressed concern with national security and the protection of the American people against an external foe. By establishing the objects of its protection—the American people—the Administration assumes and establishes the credibility and authority to act and speak on their behalf.

The Union Agent (hereafter referred to as "Union") is the opponent of sweeping civil service reform.[161] This agent is constructed as one who is concerned with the protection of federal workers against an internal foe, one who would compromise workers' rights and freedoms in service to fighting a war. By establishing the objects of its protection—primarily unionized federal workers affected by the proposed changes—the Union assumes and establishes the credibility and authority to act on their behalf.

The utility of collapsing each side's views into a representative agent is that it provides a collective representation of the primary opposing arguments. While we don't dismiss the nuances and differences between members on the same side as unimportant, the audiences of this debate as a whole likely conceived of the arguments in broader terms. It is against that backdrop of the debate, broadly conceived, that we direct our focus in this study. Given the establishment of these two agents, we now turn to our analysis of metaphors to examine the rhetorical force of the national security argument.

2. Metaphor Analysis

Within our corpus of data, several metaphoric themes emerged among the arguments presented. Those metaphors were evident in three primary issues relevant to this debate: strategy, protection, and power. Within each of these key issues, we drew on metaphoric references and compared the perspectives of the two competing agents for insights into the potential impact on the audiences of the arguments. First, we examined the issue of "strategy," that is, how each side characterized its efforts toward an ultimate goal. Second,

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[161] It is important to note that some of those who comprise the Union agent are in favor of some personnel management reforms in federal government; however, collectively, we characterize this agent as "reform opponents" because they oppose the sweeping reforms being proposed by the Bush administration, specifically those reforms that would restrict union power and union representation.

we examined the issue of "protection," in which each side identifies both the method for and the object of its protection. Third, we explored the issue of "power" and how each side expressed and conceptualized its power relative to each other and national security. These three issues—strategy, protection, and power—were arguably key for Americans in the post-9/11 world. Furthermore, each side in the debate addressed these issues, and a comparison of their differences was useful in assessing the effectiveness of the arguments.

Throughout the following analysis, we use italics to highlight particular words or phrases that were key in our interpretation of the data. Therefore, all use of italics should be considered our emphasis rather than the original authors' unless otherwise noted.

a. Strategy

The Oxford English Dictionary defines strategy as "a plan for successful action based on the rationality and interdependence of the moves of the opposing participants."[162] A strategy or plan implies intent on the part of the entity engaging in it, but strategies are often implicitly rather than explicitly stated. In the data we examined, each agent exhibited its own strategy, underlain with metaphors that supported its own and refuted the other's strategic intentions. How these strategic intentions are expressed, and the principles they illustrate, can provide insight into responses by audiences—that is, which strategies the audience may judge as rational and in their best interest. So, it is important to look at both the strategies that were expressed by each agent in the controversy, as well as the metaphors they drew upon to convey their strategic perspectives and rationales.

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[162] *Oxford English Dictionary* online, 2006, s.v. "strategy." Accessed 18 April 2006.

The Administration presents their strategy as one that requires them to have more control over federal personnel in order to provide national security and protect America. For example, President Bush argued that he needed the freedom "*to put the right people* at the *right place* at the *right time* to protect the American people."[163] The metaphor of physical placement—to "put" federal workers in particular places at particular times—is rationalized as a strategy to protect America, much like one would move a Bishop or Knight in a chess game to protect the King. This physical placement metaphor was also picked up by the news media. In one summary of the issues, an article in the *Washington Post* noted, "The White House wants to retain the ability to *remove* some employees from unions for national security reasons," and "Bush wants the ability to *move* workers from one part of the department to another to meet rapidly changing needs.[164] This metaphor of physical placement suggests that the Administration requires a particularly high degree of power and control over personnel, but that degree of power is presented as rational and justified in light of national security. To the extent that the audience is concerned about national security, then they are invited to see the Administration strategy—in this case, its need for power over personnel—as one that is consistent with that concern.

The Union critiqued the Administration's strategy in several ways. First, the Union asserted that the Administration's strategy was disingenuous. The Administration argued for the need to bypass union protections in order to place, move, or remove federal personnel where they were needed for national security purposes. The Union asserted that the

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[163] George Bush, "Remarks in Savannah, Georgia," *Weekly Compilation of Presidential Documents*, Week Ending 11 November 2002.
[164] Bill Miller and Juliet Eilperin, "Obscure Labor Issues Block Homeland Security Agency; Moderates to Decide Outcome of Democrats' Tangle With Bush," *The Washington Post*, 23 September 2002, A08.

Administration was instead anti-union, a claim they argued using metaphors of destruction and elimination. For example, John Gage, current AFGE president, questioned the connection drawn between union rights—including the right to control where personnel are placed—and national security; In a *Washington Post* editorial, Gage was quoted as asserting that such claims were "disingenuous." The editorial went on to echo some of Gage's concerns, noting, "It would be nice to believe the administration's fervent denials of a plot to *destroy* the mostly Democratic unions. But before we do, we'd like to see some clearer arguments from the administration about what the *elimination* of union bargaining has to do with either the nation's safety or civil service performance."[165] In another example from AFGE *Talking Points*, the Union asserted that the Administration's strategy represents "longstanding efforts to *bust* federal employee unions."[166] Bobby Harnage also critiqued the Administration's strategy using similar metaphors: "*Destroying* the rights of federal employees will, in turn, *destroy* any attempt to provide skilled, well-trained, professional employees to guard our nation and its citizens."[167] The Union asserted that the Administration was destroying the rights of the workers and, thus, positioned the Administration's strategy as negative and destructive. These examples illustrate the Union's perspective that the Administration strategy will destroy and eliminate the rights of workers, a move that will harm national security.

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[165] "Civil Service Reform," 31 January 2005.

[166] American Federation of Government Employees, "Faulty Premises Make for Bad Amendments: Oppose Anti-Collective Bargaining Rights Amendments and Support the Homeland Security Bill (S2452), *AFGE Homeland Security Talking Points*.

[167] Gail McCallion, "Homeland Security: Data on Employees," 2.

In addition to arguing that the Union position helps rather than hinders national security, the Union also argued that the Administration's claims about national security interests were a tactic to gain compliance for controversial personnel reforms. The Union charged the Administration with premeditation and drew on a metaphor of perseverance in arguing this claim. For example, Rhode Island Senator Chaffee, a Republican who sided with the Union in the controversy, stated, "the President and his allies knew exactly what they were doing in *holding out* on this issue." [168] A writer for *The New York Times* noted that "Many members of Congress from both parties now say that the Administration was *politically clever* in inserting the personnel requirements, foreseeing an opposition from the Democrats and an opportunity to defeat them in the face of national security."[169] To "hold out" on an issue and to be "politically clever" implies conscious intent; as a critique of the Administration's strategy, it illustrates the Union argument that the Administration was consciously strategic in their use of the national security argument and "knew exactly what they were doing."[170]

Implied within their critique of the Administration's strategy, however, is the Union's own strategy to preserve workers' rights to organize, to bargain, and to be heard. Underlying this strategic perspective is a battle metaphor which suggests that federal workers are already engaged in the war on terror. For example, Harnage said that the "*fight* against terrorism, in which federal employees have always been on the *front lines of the homeland*, is about

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[168] David Firestone and Elisabeth Bumiller, "Stalemate Ends."

[169] Ibid.

[170] Ibid.

preserving our freedoms—including our right to organize—not destroying them."[171] Colleen Kelly, president of the NTEU, also asserted that it is important to have "*frontline* employees with a real voice in how the work gets done."[172] In these examples, the Union drew upon a metaphor that suggests that employees are already in a position to support national security, and this metaphoric depiction challenges the physical placement needs espoused by the Administration.

So, here we have two strategies, from each side in the debate, both of which are supported by potentially powerful metaphors. Each side presents their strategy as right, just, and in service to what is critical and important. However, there are some key differences between the two positions that could potentially affect audience response. One key difference is the object of protection. In the case of the Administration, the focus of protection is the "American people." In the case of the Union, the primary focus of protection is a subset of the American people, the federal workers. So, while the Administration expressed a need to physically place the federal worker, the power they seek is expressed as a means to protect the larger group of Americans; that is, *all* Americans. The Union uses powerful metaphors to describe the problems with that power—destruction of the Union and the rights it affords workers, challenges of disingenuineness, and powerful depictions of federal workers as already on the frontline of the national security battle—but ultimately their strategy is directed at a subset of Americans. Thus, the various audiences being addressed may see their interests being more directly served by the Administration's strategy than by the Union

[171] Stephen Barr, "National Security Concerns Wipe Out Union Rights at Mapping Agency," *The Washington Post*, 10 February 2003, B02.
[172] Stephen Barr, "Bush's Homeland Security Team Tries to Reassure, Rally the Troops," *The Washington Post*, 21 November 2002, B02.

strategy. To put it another way, in a post-9/11 world, audiences might simply be more moved to accept various strategies in service to their own safety versus the protection of workers' rights. Similarly, an audience might not be moved by critiques of the Administration's strategy, even if the critiques were credible, if they did not view the Union's purported objective as more important than the Administration's purported objective.

The issue of protection—that is, defining the objects of protection and who needs what kind of power to ensure it—is a critical issue in this debate. In the next section, we explore this issue in more detail.

b. Protection

9/11 generated a great deal of fear in the American public, an emotional preoccupation that was clearly an issue for HSA and the personnel management reforms contained within it. A critical question in this debate was who or what needed to be protected. The Administration expressed its intention, need, and ability to protect the average American citizen. The Union expressed its intention, need, and ability to protect the federal worker.

It is interesting to explore the ways that the Administration refers to the object of its protection. For example, the Administration consistently made references to "the American people,"[173] a collective and inclusive reference that applies to everyone. Additionally, there

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[173] e.g., Bill Miller and Juliet Eilperin, "House Approves Homeland Security Bill: Bush Gets Flexibility to Shape, Manage New Department," *The Washington Post,* 27 July 2002.

were numerous references to "homeland,"[174] including but not limited to references to the Department of Homeland Security. For example, Bush noted in a speech, "We're doing everything we can to protect the *homeland* against an enemy that hates us."[175] Although there are many definitions of the term "home," as a metaphor it may invoke its more common connotation of the physical and personal home in which one lives. As an object of the Administration's protection, "homeland" simultaneously draws upon both the personal and national senses of that term; nonetheless, the personal connection invites the audience to view the object as valuable, for what is more valuable than one's home and its inhabitants? Another reference to the object of protection is "you," as expressed, for example, in a Bush speech in which he asserts the "Department [of Homeland Security]. . . is being created to secure *you*." [176] In this case, he is not referring literally to an individual, but rather is drawing on "you" as a metaphor in addressing a collective. In doing so, he establishes a connection that invites the audience to identify with the object of protection as he describes it; it is not an abstract entity, but rather *you* who are the object of concern.

The Union, in contrast to the Administration, depicts the object of protection as primarily the federal worker and only secondarily the American public. Consider these comments from Harnage: "When *public employees*' rights and protections are compromised, so too is the safety and security of *the public they serve*. […] Homeland security requires a *secure work force*. […] Destroying the rights of *federal employees* will, in turn, destroy any

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[174] e.g., Brian Friel, "Bush, Unions Tangle over National Security Exemption to Labor Laws," *Government Executive*, 16 August 2002; Charlie Mitchell, "Senators Question Bush effort to Loosen Civil Service Rules," *Government Executive*, 20 June 2002.

[175] Brian Friel, "Bush, Unions Tangle."

[176] George Bush, "Remarks in Savannah, Georgia." 8 November 2002.

attempt to provide *skilled, well-trained, professional employees* to guard *our nation and its citizens.*"[177] In these examples, the federal employees are foregrounded as needing protection so that they, in turn, can protect the public. The protection they need draws upon the concept of security, but primarily in the sense of the federal employee's own personal security rather than the security of the homeland per se. The reference to personal security involves protecting (rather than destroying) their rights as workers. Once the Union ensures protection for workers' rights, only then will those employees be able to "guard our nation and its citizens."

In addition to foregrounding federal workers as the primary object of protection, the Union also depicts the public—the secondary object of protection—differently than does the Administration. For example, in the Harnage quote above, he referred to "the public" and "our nation and its citizens." As compared with the "American people," the reference to "the public" is abstract and does not draw upon the same connection with the audience. Additionally, this reference to "the public" is couched within a reference to the primary object, the federal employee, in that it is not simply the public, but rather "the public *they serve.*" Again, then, the federal employee is still prevalent and connected to concerns involving the larger populace. The second term of reference, "our nation and its citizens," is also somewhat abstract compared with references by the Administration. While "*our* nation" creates some personal connection, the reference to "its citizens" reintroduces an abstract tone. In contrast to the directness of the term "you" as used by the Administration, "our nation and

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[177] Gail McCallion, "Homeland Security: Data on Employees," 2.

its citizens" asks the audience to place themselves within the third person reference rather than as a direct respondent of the message.

In speculating the persuasive effect of how each side in the debate dealt with the key issue of protection, we closely examined how each side depicted the *objects* of that protection. The Administration cast a wide net that encompassed all the American people, while the Union expressed their primary concern as protecting federal employees, a move that they presented as a necessary first step to protecting the public. Additionally, the Administration drew upon metaphors and concepts that emphasized connection, whereas the Union drew upon concepts that were more abstract. The audience, therefore, may have been drawn to the Administration argument because they were invited to see themselves and their interests as being served more directly.

c. Power

Each agent in the controversy expressed an intention, need and ability to offer protection for its respective objects of primary concern. The ability to protect, however, necessitates that the agent possess the power to carry out the actions they see as necessary to provide that protection. Both agents in this debate expressed conceptions of its respective power, but each did so in different ways.

One key difference was in how they each portrayed the holder of power. In the case of the Administration, such holders were primarily emphasized as individuals or second person references to groups of people. For example, the Administration argued that "a time of war is the wrong time to weaken *the president's* ability to protect the American people,"[178]

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[178] Bill Miller and Juliet Eilperin, "House approves Homeland Security Bill."

and "I don't think you'll ever be able to say that you've done all you can do to enhance security of this country if you don't give *a new secretary* […] flexibility."[179] In numerous other instances, Bush relied on the use of personal pronouns: "*I* need to have the ability to put the right people at the right place at the right time;"[180] "*I* would have the capacity […] to suspend those rules;"[181] and "*I* need the flexibility to be able to look at the American people and say *we're* doing everything *we* can to protect the homeland against an enemy that hates us."[182] In all these cases, the holder of power is an identifiable entity, one who can be held accountable—at least through identification—for the power and subsequent actions the agent takes. The Union, however, portrays the holder of power primarily as a system or abstract collectivities. For example, "the *merit system*" is held up as an entity which can ensure "*protection* for *whistleblowers who alert Congress and the public* to fraud, abuse, mismanagement, and *threats to national security*."[183] In other examples, systemic collectivities are emphasized as the holders of power: "*Federal employee unions* have formally represented the vast majority of the federal workforce for forty years. *Union membership* has never been inconsistent with national security,"[184] and "[one of] the most important things needed to improve homeland security [is] *frontline employees* with a real voice in how the work gets done."[185] In these examples, the holders of power are union leadership and union membership, systemic collectives that are not as easily identifiable and, thus, do not carry the same perception or degree of direct accountability. From the

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[179] Ellen Nakashima and Bill Miller, "Bush to Ask Workers for Flexibility."
[180] Brian Friel, "Bush, Unions Tangle."
[181] George Bush, "Remarks in Savannah, Georgia."
[182] Brian Friel, "Bush, Unions Tangle."
[183] American Federation of Government Employees, *Homeland Security Talking points*.
[184] American Federation of Government Employees, "Faulty Premises Make for Bad Amendments."
[185] Stephen Barr, "Bush's Homeland Security Team."

perspective of the audience, it is plausible that the Administration's call for more power, in service to protecting the American people against threats to national security, was persuasive because of the direct relationship being drawn between the threat and who, specifically, was taking action to combat that threat. In the case of the Union, their portrayal of the entity that holds the power added another level of abstraction. As we saw previously, the first level of abstraction was that the object of protection was primarily the federal worker, a subset of the American people. Now, the second layer of abstraction is introduced: the holder of power portrayed by the Union is a system or collective that is taking responsibility for providing national security—a characterization that introduces a diffused entity and, therefore, only indirect accountability.

In addition to differences between depictions of the holders of power, each side also deals differently with how it characterizes its actions on behalf of national security. The Administration draws on action metaphors to describe and rationalize their need for power. For example, the Administration argued for personnel management changes so that it could "*create* a modern, flexible, and responsive program,"[186] "*put* the right people at the right place,"[187] and "*run* this department."[188] The Administration also repeatedly linked its actions directly to the needs of national security or the American people. Consider these examples: "I would *have the capacity*, for the *sake of national security*, to *suspend* collective bargaining rules,"[189] and to "*retain the ability to remove* some employees from unions for *national*

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[186] "Bush administration analysis of homeland security legislation," *Government Executive,* 18 June 2002.

[187] George Bush, "Remarks in Savannah, Georgia."

[188] Brian Friel, "Bush, Unions Tangle."

[189] George Bush, "Remarks in Savannah, Georgia."

security reasons,"[190] and finally "I will *not accept* a lousy bill that makes it impossible for the president […] *to do what the American people expect*, and that's to *protect the homeland*." In all of these examples, the Administration portrays its efforts in active terms, often linking those actions directly to the protection of the American people and the needs of national security.

The Union also describes its actions drawing on active verbs, but often in service to the federal employee or the union rather than the American people. Additionally, when national security is addressed, it is often done so secondarily. For example, AFGE talking points argued, "Federal employee unions have *formally represented* the vast majority of the federal workforce for forty years. Union membership has never *been inconsistent with national security*."[191] In this case, the act of formal representation is an active move, but it is taken on behalf of the federal workforce. Additionally, the link provided between the actions of the federal workforce and ensuring national security is more passive than active. That is, rather than characterizing the federal employees as directly impacting national security, in this instance their actions are such that they are not "inconsistent" with efforts to ensure national security. This lack of direct connection between actions and national security concerns is evident in this example as well: "Federal employee unions have *helped* to keep the *homeland secure*."[192] While "help" is an action, it is a much weaker action when compared with the Administration's efforts to "create" and "run" a department or "do what the American people expect" in service to national security. Importantly, there are instances

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[190] Bill Miller and Juliet Eilperin, "Obscure Labor Issues."

[191] American Federation of Government Employees, "Faulty Premises Make for Bad Amendments."

[192] Ibid.

in which the Union describes stronger actions. For example, consider the connotations of the metaphor "stand up" in this instance: "No one who *stands up* for the rights of collective bargaining should have their patriotism questioned." [193] However, here again, the strong action is associated not directly with national security, but rather with a worker's right to collective bargaining. The issue of collective bargaining is presented here as separate from one's commitment to the nation. Though such a distinction may be credible, the power of the Union agent and its associated actions is still more directed toward protecting the federal employee than national security or the American people.

Finally, in addition to the difference between the Administration's relatively strong actions and the Union's relatively weak or potentially self-serving actions, each critiqued the other in ways that served to bolster these initial characterizations. Bush, for example, argued that those who opposed management reforms wanted legislation that "*strips* me of authority,"[194] and wanted him "to *forfeit* power."[195] Bush also argued that "A time of war is the wrong time to *weaken* the president's ability to protect the American people,"[196] and that he wouldn't accept legislation that "that *limits or weakens* the president's well-established authorities."[197] These critiques by the Administration do two things: first, they cast the opposition as making unreasonable demands that would compromise national security, and second, they reestablish the Administration's strong power position. By drawing on

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[193] Stephen Barr, "Plenty of Tough Issues at Homeland Security Department," *The Washington Post*, 21 January 2003, B02.

[194] Brian Friel, "Bush, Unions Tangle."

[195] Ben White, "Civil Service Changes Stall."

[196] Bill Miller and Juliet Eilperin, "House Approves Homeland security Bill."

[197] Ibid.

metaphors of removal, forfeiture, and weakness as so clearly damaging to the power necessary to protect the nation, the Administration effectively bolsters its own argument that it needs the power it seeks and should rightly retain the power it already possesses.

The Union also offered its own critiques of the Administration's actions. Their harshest criticisms, as defenses against the power sought by the Administration, actually served to reestablish Administration authority, even as the Union was fighting against it. For example, the Union argued that "We see the administration's use of 'flexibility' as a code word for *denial of due process* to federal employees,"[198] and that "merely because an employee performs work related to homeland security should not automatically mean that his union membership should be *outlawed*."[199] In each of these cases, the Union implicitly acknowledges the power of the Administration to, in one case, "deny" due process, and in another case, to "outlaw" union membership. The empirical reality of these executive powers aside, the discourse directs the attention back to the primary power holder—the power holder who has repeatedly linked its actions with concerns about national security and the protection of the American people—as, in fact, already possessing some of the very power it seeks. In the old self-help mode of "acting as if" one *is* something as a route to actually becoming it, the Union critique in this instance actually serves to bolster the Administration argument and its need for (continued) power.

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[198] Ibid.

[199] American Federation of Government Employees, *Homeland Security Talking points*.

D. Conclusion

This analysis of how each side presented its perspective on strategy, protection and power helps to explain the rhetorical force and persuasive appeal of the arguments. The Administration emphasized deliberate, accountable actions that they needed to take to protect the American people against a threat to national security. The Union mounted a defense against the Administration's arguments, emphasizing the need to protect the federal worker as a necessary prerequisite to any ability to provide true security for the nation. While each side presented strong metaphors to underscore their positions, ultimately the debate centered on the needs of the "American people" vs. the needs of the "federal worker."

It is our contention that audiences identified more directly with the Administration's arguments than the Union's arguments within the culture of fear following 9/11. So, beyond the existence of the tragedy itself, it was the communication which drew upon the tragedy— in specific ways—that ultimately paved the way for the passage of controversial personnel management reforms. Although many of the same arguments had existed in personnel management debates prior to 9/11, the arguments took on new rhetorical force against the backdrop of national security fears. Additionally, the characterizations of the agents in the controversy were also rhetorically significant for audiences of this debate. Given the new rhetorical landscape, audiences were likely more persuaded by agents who exhibited strong, decisive, almost paternal action in the face of known and unknown threats to the "homeland." Conversely, the Union's arguments for worker protections, systemic remedies for problems, and solutions that depended on collective over individual action were not as effective as they had been in the past. Quite simply, the events of 9/11 changed the criteria by which the various positions in the personnel management debate were judged. Given those changes, the

rhetorical force of the Administration's arguments were pivotal in passing this legislation as part of the HSA.

VI. Discussion

A number of themes have been identified, and some important issues have been raised in this case history. This chapter will explore some of those issues for their effects on the HSA and more broadly for their implications for DHS and future policy making.

A. The Design and Drafting Process

The process used by the White House to design the new DHS and draft the proposal that was presented to the Cabinet and sent to Congress was an exception to the norm. The proposal was drafted in secret by a small staff group in the White House. This group did not coordinate with the departments or agencies that would be affected by the proposal. The initial language was general, and even the legislative language was drafted in broad strokes. A more normal legislative development process would have involved staffing and coordination with subject-matter experts throughout the Executive branch; careful drafting by legislative counsel; prior notification, coordination, and negotiation on Capitol Hill; and perhaps even consultation with interest groups.

The White House staff group admittedly lacked expertise in matters of personnel management policy. As Bruce Lawlor said, "We could not have constructed the intricacies of a new personnel system. We did not have the skill set to do that, so our design was to create as much flexibility as we could, so then we could bring it back and have the professionals finish the bill."[200] This lack of expertise was not lost on Colleen Kelly, who observed that, "It looked like it was being drafted at the White House by a very small group of people who

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[200] Bruce Lawlor, interview.

were not really expert in this kind of law."[201] Ultimately, the process that characterized the

drafting of this legislation had both advantages and disadvantages. The importance and

implications of drafting the proposal in secret and employing general language are discussed

below.

1. Secrecy

The small White House staff group worked in secret in the Presidential Emergency

Operations Center (PEOC). Stung by the failure of an earlier attempt to coordinate a bill on

border security throughout the government bureaucracy, the White House decided to draft

the homeland security proposal without coordination with the cabinet departments. In fact,

most of the members of the Cabinet learned about the proposal, and its impact on their

departments, only a day before its public release. As Kay Cole James describes, "The phone

rang about mid-day, asking that I come over to the White House at 6:00 pm. Then, Mark

Everson laid out to me that he and several others had been involved in shaping this thing

called the Department of Homeland Security, and it was going to be announced the following

morning."[202] No time or opportunity existed for turf wars.

This strategy proved successful in getting a proposal done in a timely manner. Given

the experience with the failed border protection agency, it is likely that this more expansive

government reorganization would have encountered even more organizational hurdles.

Conceivably, the same challenges may have existed for proposing changes to personnel

management policy. Although none of the White House staff members writing the proposal

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[201] Colleen Kelly, interview.

[202] Kay Cole James, interview.

had particular expertise in personnel management, soliciting outside help may have slowed down the process considerably. For example, if OPM had been brought into the process earlier, substantive expertise would have been added to the group; however, such a move may have carried the risk of getting bogged down in regulatory detail.

Similarly, the group's decision to act without consulting unions, employee associations, or key Capitol Hill committee staffs made the work of the G-5 easier and more expeditious. Consultations would almost certainly have resulted in unwanted negotiations, compromises, and leaks. But foregoing the input of interested parties also meant that their concerns went unaddressed—and consequently unanticipated—until the issue was in the public domain; therefore, debates took on a more strident and uncompromising tone. Given the distrust the unions felt, secrecy served to increase their unease with the administration.

2. General Language

Initially, the White House discussed "management flexibility" in only a general sense. When it came time for the proposal to be put into legislative language, experts from other departments and agencies had to be consulted, but with little time for detailed work. The original personnel management segment consisted of only general language giving the Secretary of the new Department and Director of OPM authority to institute new personnel management rules. It is known from later developments that the anticipated rules would address such matters as pay banding, pay-for-performance, employee mobility, and new labor-management practices, but none of these issues was expressly addressed in the legislation. Instead, the drafters of the bill took the approach that Congress should establish the general framework and intent of the legislation and leave implementation matters to the Executive Branch. As Kay James argues, "You don't want people on the Hill writing

personnel rules. There's nobody up there with the capacity to do it. I knew the people at OPM who did. What it means when you leave it to the legislators is that whoever has the biggest lobby [makes the policy] …and that makes for poor laws."[203] OPM's Ed Flynn explains further:

> [T]his really was an effort to, sort of, create a framework that was different in both substance and character from previous efforts. Previous efforts largely were tinkering with the articles and provisions of Title 5—sometimes, very selectively, sometimes quite broadly. The legislative proposal for the department recognized the complexity and attempted, in effect, to set a new framework for HR management within the department.[204]

The strategy of employing only general language had its advantages and disadvantages. The less detail there was expressly stated in the bill, the less there was to be debated, argued and amended. Instead, the administration was able to address their concerns for personnel management in broad terms. When pressed for details and examples, the administration seemed actually to lose ground with controversial and debatable examples about drunken border guards and the use of radiation detectors. On the other hand, a paucity of detail helped to energize the opposition. Whether whistleblower protection was ever an intended target of the administration, the "notwithstanding" wording gave the unions an immediate effective argument, and led them to be able to ask what else might be behind this bland proposal.

Taken together, the strategies of secrecy and general language were very effective, at least for the short-term goals of getting the legislation drafted and enacted. Secrecy not only minimized turf wars within the Executive branch, it limited the ability for the opposition to

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[203] Kay Cole James, interview.

[204] Ed Flynn, interview.

mobilize for a fight. General language forced the debate to be about general principles of efficiency effectiveness, national security and labor relations policy. These were policy spaces where the administration had a distinct political and rhetorical advantage. It is reasonable to doubt that a more open and detailed approach would have produced a better proposal in a timely manner. In fact, it might be doubtful that any such proposal would have survived at all under those circumstances.

However, later developments, beyond the scope of the present study, suggest that the result of secrecy and generality has been that the detailed issues are fought out after enactment. The price of secrecy and generality in the design and enactment phases may very well be the difficulties in implementation and successful legal challenges that have been experienced post-enactment.

B. Congressional Consideration

The role of Congress and the dynamics of the congressional processes in this case present some salient issues.

1. Majorities and Rules in the House and Senate

The differences in the ways in which the House and Senate acted on the homeland security bill reflect differences in the rules of the two chambers and the impact of party majorities in each. In the House, which was controlled by the majority Republicans, action on the President's bill was fast, coordinated, and led by the Republican leadership. A rare, if not unprecedented, simultaneous referral to and reporting by multiple committees, and a special committee chaired by the Majority Leader ensured expedited consideration and a prompt vote in the House. The Senate, however, was split evenly along party lines, and the Senate has rules that require extraordinary majorities to limit debate. Moreover, the initiative

for homeland security legislation rested with a Democratic Senator who was expected to be a strong contender for his party's presidential nomination. The political dynamics in the Senate were very different from those of the House, and efforts to expedite a floor vote were frustrated by the inability to invoke cloture. The Republican leadership in the Senate could not have expedited the President's bill, as did their counterparts in the House.

2. Interest Groups

Secondly, interest group influence was a significant factor, particularly in the Senate. The ability of the federal employees' unions to raise issues and mobilize supporters in the Senate led to contentious debate and delay beyond initial expectations. At times they seemed to be winning. The role of interest groups in the legislative process is not, in itself, remarkable. What is remarkable in this case is that there were not contesting interest groups, as there are in most controversial issues before Congress. Instead, the federal employee unions appear to have been the only interest group on the playing field. This may well be a reflection of the arcane nature of public personnel management. The community of people who are interested in such an issue is small enough—scholars, government managers, management experts—but the universe of people who really care about the issue is limited to affected employees and their organized representatives. There is no apparent evidence of any interest group acting as advocate or intermediary for the administration's position. Thus, instead of opposing interests providing the briefing papers and making the arguments in a legislative tug-o-war, the contesting forces here were the administration and the unions, who were competing directly with each other for votes.

3. Failed Compromises and Suspected Motives

It therefore follows that the administration and the unions were in a position of having to deal with each other if compromise and agreement were to be achieved. In fact, the administration was reportedly encouraged by members of Congress to consult with the unions. Both sides indicate that they were willing to make substantial compromises—to "put a lot on the table." Yet, each side perceived unwillingness on the part of the other side to make a deal. How could these highly capable leaders, experienced in policy and politics, misread each other's signals? It remains unclear what exactly each side was willing to negotiate and give up. It is possible that neither side could have compromised enough on the most contentious issues, such as the president's national security authority, to reach an accord. But, there is also no apparent evidence that serious negotiations took place. Is it possible that the failure to reach a compromise rests in fundamental differences between the two sides and the motives they ascribe to each other? Certainly, the administration and the unions were political opponents. If the union leaders truly believed that the administration was out to break the unions, and if the administration truly believed that the unionized federal bureaucracy was a barrier to good policy and good management, there's little basis for the trust required to make and keep deals. Sometimes issues just have to be fought to a vote, and this may have been the case here.

4. The Elections

The outcome of the 2002 congressional elections decided the outcome of the HSA. Republicans had gained the majority in the Senate and expanded their margin in the House. Pivotal campaigns were influenced, if not decided on issues surrounding the HSA. Congress clearly saw the need to return soon after the election and rid itself of this issue. A different

outcome at the polls would certainly have resulted in a different dynamic on Capitol Hill.

How did the unions and their Democratic supporters get into such a difficult political

position? Mark Rogers, former senior advisor on legislative affairs to the Director of OPM

and an experienced labor policy expert, thinks the unions saw this as "'a normal policy battle

that 'we've done before. We'll fight on that, and we hope to prevail.' But they totally

misread the bigger issue and how it evolved and how it was viewed from the outside."[205]

Perhaps, but sometimes politicians have to go into an election with whatever they've got.

Each side had some strength in its corner. Republicans had the advantage of White House

support and an effective argument based on national security. Democrats had the support of

a powerful constituency group, capable of providing campaign support and voter

mobilization—a winning alliance in past elections. Miscalculation or not, each side went

into an important and hard-fought election with some strong political assets. The legislative

fight was taken into the political arena; the election outcome decided the legislative outcome.

C. Rhetoric and Argumentation

If the elections were decisive for HSA, then the passage of this historic legislation can

be largely attributed to the rhetorical framing of the debate. The public debate over the

personnel management provision, on Capitol Hill and during the 2002 elections, can help to

explain the outcome. The rhetoric of reform was such that, prior to 9/11, the debate over

civil service reform was stalemated as both sides argued over issues such as strategic human

capital management, modernization, flexibility, accountability, broadbanding and

paybanding, performance-based pay, recruitment and retention, union busting and partisan

differences. All of these issues were argued over in the post- 9/11 period, as well. But after

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[205] Mark Rogers, interview by authors, 22 September 2005.

9/11, the proponents of reform cloaked the management argument in a larger context of national security. On the surface, the debate seemed to have changed from management flexibility vs. workers' rights to national security vs. union collective bargaining. Examined more deeply, the Administration appeared to be more successful in framing the national security argument more persuasively, especially in presenting a justified strategy, the case for protecting the American people, and the necessity for securing the power to provide that protection. These differences appear to have been highly influential in the elections and thus highly influential in the legislative outcome.

Ultimately, by connecting public management ideas to the security issue, and debating it on a macro-political level in a homeland security venue, the White House was able to achieve public management goals where it and others had previously failed.[206]

D. Gateway to Civil Service Reform?

What were the administration's intentions when personnel management reform was included in the HSA? Was the focus on personnel management for DHS, or was this intended as a first step toward broader civil service reform? There are differing views about the intentions behind the HSA personnel provision. The OPM staff members who worked on the language and subsequent regulations say they were focused only on DHS. From their perspective, any precursor for further reform would come later. According to Ed Flynn:

> What was attempted was to create a framework for human resource management that would be right for the public sector for the time, but which [...] could also evolve through an open, transparent, regulatory process. [...] The emphasis was on creating a framework for this department to come together as quickly as possible and to be as effective as possible.[207]

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[206] Donald P. Moynihan, "Homeland Security," 177.

[207] Ed Flynn, interview.

However, others saw clearer implications that DHS could be the starting point for wider reform. For example, Mason Alinger said, "I know very well that people had every intention that, if we can start it here, this is a massive enough agency that we can start to do personnel reforms more broadly from this point forward."[208] Some saw the opportunity for wider application, even though they remained focused on DHS at the time. For example, Joel Kaplan observed that the possibilities for expansion were at least in the back of some minds.

> After 9/11, the whole government and the White House was so focused, especially at that time, responding to terrorism and the threat post-9/11. So we weren't really looking at using this as a wedge, like a camel's nose under the tent. We were really focused on making this work. That said, I think [...] others understood, that if you can create something that works, it's a new way, it'll be a new way of doing business that could serve as a model in the future.[209]

Bruce Lawlor seemed to agree: "it became clear very early on that if the opportunity to create, within the department, a reformed civil service arose, that was going to be something this administration was going to go after."[210]

Clearly, there are indications that some saw opportunity and intentions for further reforms. The complexity of merging disparate personnel systems into a single agency and the urgency of the legislation provided ample opportunity to introduce a new approach to personnel management into the new department. Indeed, the G-5 seemed to think that this extension was a simple and logical step and, if the new approach worked, it could be a prototype for further reforms. At the higher policy levels, however, there is the clear suggestion that senior White House officials saw this as more than just something to do for

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[208] Mason Alinger, interview.

[209] Joel Kaplan, interview.

[210] Bruce Lawlor, interview.

homeland security; it was a way to advance an important part of the President's management agenda. Perhaps, then, the question of intention depends on the level of the policy maker. The OPM staff say their focus was on DHS; for the G-5 the focus was also on DHS, but with an understanding of the implications for advancing the PMA; and perhaps for the most senior White House officials, the objective was make a start at widespread reform. Subsequent enactment of the National Security Personnel System for the Department of Defense and the administration's proposed Working for America Act are further evidence of the White House commitment to personnel management reform throughout the federal government.

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VII. Summary and Conclusion

The preceding chapters have discussed the history of civil service reform, presented a case history of the enactment of the Homeland Security Act focused on the personnel management provisions of the Act, and examined the arguments involved in the debate over the HSA personnel management issue. The story that emerges is one of a rare alignment of policy environment, policy opportunity, politics, and rhetorical argument. The result was enactment of legislation that it is reasonable to argue would not otherwise have been possible.

A. Summary and Conclusion

Since at least the 20th anniversary of the CSRA, many who deal in civil service policy have believed that a new round of reform was needed, but achieving reform has proven difficult. Indeed, even limited attempts at legislation by recent administrations had failed and, instead, innovations in personnel management were pursued mostly in the context of demonstration projects. Yet, this time it was different. It may now have become a cliché to say that "9/11 changed everything," but 9/11 certainly changed the policy environment in which civil service reform was debated in 2002. Reform was connected to concerns for homeland security. A new and different policy environment was created.

Urgent legislation provided a policy opportunity: the HSA was the perfect legislative vehicle for an approach to personnel management that was already on the minds of administration policy makers. With the President's Management Agenda already developed, the HSA represented a fortuitous meeting of preparation and opportunity for the White House. Interviews with administration staff members have shown that inclusion of

"management flexibility" was conceptually so easy that it did not even require much discussion.

The politics of this issue were more complicated. Here it is difficult to discern strategies and motives with certainty. On the one hand, there are administration officials who claim they were just doing what they believed was right and that politics was not a consideration. On the other hand, there is a putative Democratic presidential candidate pushing an alternative bill in the Senate and politically powerful public employee unions with a history of supporting Democrats. Both the unions and the White House employed the leverage of political support when looking for votes on Capitol Hill. In the context of a very competitive off-year election, it is tempting, but not sufficiently supported, to think that everything was done with an eye on how it might affect the elections. Regardless of intentions, the effects of politics on this issue are quite clear. Key Democrats who stayed with their union constituencies were defeated at the polls. The 2002 congressional elections had a decisive effect on the legislation—and vice versa.

So far, this tells what happened but not why it happened. Why did the confluence of this particular policy environment, policy opportunity, and politics combine to result in enactment of controversial civil service reform? One powerful explanation is the framing of the debate and the rhetorical arguments that each side employed. Simply stated, the supporters of reform presented their arguments in terms of national security, and their opponents argued in terms of collective bargaining rights. In some sense this framing was, perhaps unwittingly, facilitated by the administration's decision to draft its proposal using only very general language. A debate framed as "national security vs. union special interests" is quite different from one that might have been framed as "management flexibility vs.

workers rights," for instance, or a debate mired in the details of civil service law. Even when

both sides addressed the issue of national security, an examination of the different ways they

addressed strategy, protection and power shows that the administration's arguments had the

stronger national security framing. In the post-911 policy environment, "national security"

was a political trump card, even damaging the campaign of an undisputable patriot like Max

Cleland. The difference between pre-9/11 and post- 9/11 debate over civil service reform is

the introduction of the national security issue. If the first civil service reform was triggered

by a national calamity, so too were the most recent reforms. As Bruce Lawlor expressed it,

"I don't think you'd see any kind of civil service reform if it wasn't in the context of this bill.

Washington just doesn't move except in times of crisis. [...] This gave them the momentum

that they needed to try to reform the system."[211]   It is hard to imagine something as prosaic as

management reform otherwise igniting passions beyond those relatively small constituencies

of affected federal workers and the organizations that represent them.

B. Implications and Recommendations for Further Study

Now that HSA is law, there are longer-range implications to be considered. DHS and

OPM must design and implement new personnel management rules under the full scrutiny of

interested parties—unions, public employee associations, DHS management, congressional

committees, etc. It is likely that such transparency will mean that issues that were not

debated and resolved during the enactment phase will be contested in the implementation

phase. This, in turn has implications for the spread of personnel management reform in the

federal government. If the DHS personnel system is really to be "the prototype for the rest of

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[211] Bruce Lawlor, interview.

government in the coming years,"[212] much depends upon successful implementation at DHS. Though post-enactment developments are beyond the scope of this study, there are clear indications that union legal challenges and administrative problems have delayed implementation at DHS and also have delayed the deployment of the similar NSPS at the Department of Defense. The administration's proposed Working for America Act is stalled as well. Further study is recommended to chronicle and analyze the implementation of the above legislation for the lessons to be learned for future policy makers and federal managers.

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[212] Donald P. Moynihan, "Homeland Security," 171.

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